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The clean hands doctrine in the international jurisprudence

Stefan Buckley, Oliver Sander, Paul Stein, Gottlieb Karr

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To our families

Stefan Buckley, Oliver Sander, Paul Stein: Clean hands control in the International Court of Justice

Part 1

Clean hands control in the International Court of Justice

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Introduction[1]

This work seeks to analyze the "uncertain" theory of the clean hands doctrine in public international law. The theory of clean hands was born and is part of the common law system. It found its basis among the first points of reference of the Courts of Equity at the end of the 18th century where according to the

[1]Part of the present publication was published in the American Yearbook of International Law-AYIL, n. 2, 2023.

positions of Sir Gerald Fitzmaurice: “(…) who comes into equity must come with clean hands (…)” (Fitzmaurice, 1957). They were formed over time different theories alongside the main one which we also find in civil law systems.

The clean hands doctrine prevents a person, who has behaved with illicit conduct in the face of a judicial request, to presenting before the judge and to denouncing the related actions of the other party with the aim of demanding the recognition of this right and the related remedy.

The clean hands doctrine is configured as a type of procedural defense used by the defendant to block the relative request of the plaintiff, according to the principle of fairness. It is established as a type of defense in one's own hands. This means that the dispute must be resolved in a favorable way by the requesting party. It is understood that one of its objectives is the preservation and integrity of the judicial system, i.e. to allow and obtain the recognition of a right that has been acquired illicitly and which raises strong doubts regarding the integrity of the entire judicial system.

Qualifying the theory of clean hands as a procedural principle of international law also supports a theoretical approach based on international judicial practice (Combacau, Sur, 2019). And how does this happen?

We start from the general reconstruction of the general principles of law recognized by civilized nations, one of the sources of the International Court of Justice (ICJ), according to Art. 38, par. 1, letter. c) of the Statute of the ICJ relating to the appeal to decide proceedings which are presented to the ICJ (Kolb, 2013; Thirlway, 2014).

The clean hands doctrine according to this source becomes valuable both in the legal traditions of civil and common law by assuming a procedural principle of legal logic, shareable by the systems of civilized countries.

The clean hands doctrine is present in Anglo-Saxon case law as well as in the civil law system, looking for implicit terms similar to the *lex specialis* that respect the principle of *bona fide* as a requirement that finds support in international practice.

An open debate, given that the clean hands doctrine is not part of general international law as it has been stated, is focused on: "(…) the importance of the (..) doctrine in international law (…)" (Dugard, 2005; Crawford, 2017).[2]

The relevant jurisprudence from international courts regarding inter-state disputes of a direct and indirect nature (diplomatic protection) is also consistent with the relevant jurisprudence of

[2]Special Rapporteur John Dugard on Diplomatic Protection: Report of the International Law Commission, 57th sess., 2005, UN Doc A/60/10, 110.

investment arbitrators relating to disputes opposing a foreign investor of the so-called host state.

Specifically, in inter-state disputes the clean hands doctrine as well as the principle of equity is like a type of agreement which excludes the relative possibility of invoking international responsibility for the state that has committed a wrong in relation to a right that is disputed.

We can also take the clean hands doctrine into consideration in the briefs that are presented by the defendant states in proceedings before the ICJ and in the related dissenting opinions of the judges, who are part of the ruling of a dispute. Although the ICJ has not adhered to explicit terms relating to clean hands and has not taken a position to exclude its inclusion from the general principles of international law, the jurisprudential history of the ICJ has shown that it has had the opportunity to take a position in a defense presented by the respondent states.

The International Law Commission (ILC) has adopted the relative doctrine in the draft articles on diplomatic protection, trying to demonstrate that international jurisprudence as well as the works of the ILC cannot be considered among the preliminary exceptions, that exclude the admissibility of the relative presentation request. Therefore, it is depicted as a procedural principle of the ICJ considering that the needs of

justice and fairness do not neglect the defense, that is accepted as a practical result even if exclusion occurs in part or in total for the instant part of the unclean hands to ask for the relevant remedy.

The collateral but not primary effect is to prove the responsibility of the subjects of international law, i.e. the clean hands doctrine as a principle that hinders the judicial remedy constituting, therefore, a sure deterrent to illicit and immoral actions which do not necessarily require a relatively “sanction” (Carreau, 2018).

For the correctness of international relations, the relative certainty of legal results, that is part of the clean hands doctrine, constitutes the rationale that inspires the present work, excluding the sector of international arbitrators in the investment sector, trying to base itself on fundamental objectives for the international community perspective of the dynamics they develop.

Nowadays the jurisprudence of international courts and especially of the ICJ as well as of arbitral tribunals in the investment sector are the most appropriate means that offer a significant contribution to the development of the general theory, that we will try to analyze for the clean hands doctrine. This position does not exclude that in the near future the analysis can also be focused on other jurisprudential lines, where the theory of

the clean hands doctrine takes a position for both the judges and the parties involved.

The birth of the clean hands' doctrine

The principle of fairness was the root of the clean hands doctrine,[3] which was developed out of the general principles that positive law includes (Leigh Anenson, 2018a). Sir Gerald Fitzmaurice affirmed, in this regard, that: "he who comes into equity must" have clean hands (Fitzmaurice, 1957).[4] A theory

[3]They call it a "doctrine" because it imposes "(…) a particular principle, position, or policy taught or advocated (...)". It is treated as a thesis of a procedural nature, as a defense to a preliminary objection. 299 So.3d 259 (2019), Colby Furniture Compnay, INC.v. Belinda J. Overton. Court of Civil Appeals of Alabama, December 6, 2019. Rehearing Denied January 17, 2020. Appeal from Marion Circuit Court, (CV-95-118.02): "(…) is to prevent a party from obtaining relief when that party's own wrongful conduct has made it such that granting the relief would be against equity and good conscience.

[4]See the case: Keystone Driller Co. v. General Excavator Co., 290 U.S. 240 (1933): "(…) such a wrongful act must have an immediate and necessary relation to the equity that is being sought (…)". 847 So. 2D 371 (2002). Holy Family Catholic School et al. v. Charles W. Boley. Court of Civil Appeals of Alabama, April 5, 2002. Incesya Vallisoletana S.L. v. Republic of El Salvador, ICSID Case No. ARB/03/26, award, 2 August 2006, para.

that also found its basis in the English Courts of Equity at the end of the 18th century. Various terminologies were, also, mentioned and developed in the common and civil law systems (Pomeroy, 1941).

The clean hands doctrine prevents a person who has chosen to follow the path of illicit, immoral conduct relating to the claim made before a judgment by presenting himself to a judge and denouncing the actions of the other party, thus demanding recognition of his right and requesting the relevant remedy. As can be understood, the clean hands doctrine is also a type of defense (Pomeroy, 1941)[5] which is available to the defendant with the aim of defeating the plaintiff's claim that he is in the position of being guilty of a tort by seeking the right to be

240 using expressions such as: *ex delicto non oritur actio* (an illicit act cannot serve as a basis for legal action), *nemo ex suo delicto meliorem suam conditionem facit* (no one can place himself in a better juridical position through a crime), *ex turpi causa non oritur actio* (an action cannot arise from a dishonorable cause), *inadimplenti non est adimplendum* (one need not fulfill one's obligation if the other party has not fulfilled one's), and *nullus commodum capere potest de injuria sua propria* (no one can be allowed to take advantage of his tort).

[5]According to Pomeroy: "(…) the clean hands doctrine is (…) a universal rule guiding and regulating the action of equity courts in the interposition on behalf of suitors for any and every purpose and in their administration of any and every species of relief (…)".

satisfied (Yackee, 2012).

The defense of clean hands also means the involvement that the applicant has been demonstrated in an illicit act in relation to his request (Cosar, 2015)[6] and as a consequence of this the dispute of not being resolved favorably by the party who presented the instance (Mitchell, Sornarajam, Voon, 2015).

The application of the theory of clean hands is integrated into the judicial system obtaining thus recognition of a right that is acquired illicitly and which has caused doubts regarding the integrity and overall justice of the system. The topic is not easily exhausted given that the clean hands doctrine offers a general theory, which specifies the position of an international procedural panorama that takes place.

The objective is the qualification of the doctrine as a procedural principle of international law, arriving at speaking for the general principles that are included in Article 38, par. 1, letter. c) of the ICJ (Kolb, 2013), which allows appeals to presented before the Court. These are substantive and procedural principles that are part of the legal systems of civilized countries. Thus, the clean hands doctrine presents itself as a source of international law although the question remains whether this theory is shared by

[6]"(…) in regard to proof, tribunals have many tools at their disposal; they are afforded wide discretion and investigative powers by the procedural rules (...)".

national systems with regard to the legal traditions of common and civil law. This question can certainly be answered positively and it is stated that clean hands take a place among the general principles.

What does international procedural law claim?

We note that Art. 33, par. 1 of the UN Charter indicates the methods for the peaceful resolution of disputes and as a consequence the recourse to an international judicial forum.
Within this context, the obligation to resolve disputes peacefully was also based on Art. 2, par. 3 of the UN Charter (Pellet, 2014).
The issue is whether international courts and tribunals have adopted a shared approach that respects procedural issues and whether they are similar in the application of the law so as to allow treatment in a single and unitary manner. Of course, this is understandable in practice through the Chester Brown case, which sustains: "(...) common law (...) of international adjudication (...)" (Brown, 2009).
The author refers to the Anglo-American legal tradition and suggests that the common law system exerts an influence in the resolution of disputes given that it presents itself as a body of law of a homogeneous nature, that is applied by international courts

and tribunals as well as to the procedure and to remedies, where the relevant constituent instruments have provided rules to fill gaps.

The rules develop a process of cross-fertilization (Sands, 1998), as a type of international law procedure that agrees and can consider issues of a procedural nature which take on a relevance when the clean hands doctrine is placed among the principles of procedural law (Schwarzenberger, 1986; Kolb, 2006). This definition of procedural law is based on a substantial agreement (Schwarzenberger, 1986) explaining thus why the different national legal systems have traditionally assigned different meanings to the term procedure.

In common law systems procedural law is named in an exclusive way respecting the substance of the law (Carruthers, 2004; Garnett, 2012; Collins, 2022). In this spirit, we recall the Lush LJ in Poyser v. Minors case of 1881 where it was stated that: "(…) practice (...) like "procedure" (...) denotes the mode of proceeding by which a legal right is enforced, as distinguished from the law which gives or defines the right, and by which means of the proceeding the court is to administer the machinery as distinguished from its product (…)" (Jolowicz, 1983).[7]

[7]Poyser v. Minors, (1881) 7 QBD 329, 333.

In other words, the doctrine has tried to keep distinct the process of substance (Cappelletti, Bryant, 1987). Regarding this type of distinction, Scarman also stated that: "(…) When is a question merely one of evidence or procedure? I attempt no general answer to this question; an answer can only be made after an analysis of the specific question calling for decision, its legal background and factual context (…)" (Brown, 2009).[8]

In national civil law the procedure in a broad sense includes not only the rules according to which the court is seized as well as the process that is concluded "(...) but also the rules governing judicial organization, establishing the composition and operation of the courts, and the rules determining the competence of these various courts (…)" (Blanc-Jouvan, Boulois, 1972; Vincent, Guinchard, 1999).

The distinction between substance and procedure is also established: "(…) to argue that procedure becomes substance when it determines the particular "outcome" of a legal dispute, then it appears necessary to concede that almost everything is substance (…). If procedure is confined to the methods by which legal claims are initiated and proven, there is little doubt that much of the substantive law governs procedure (…)" (Cappelletti, Bryant, 1987).

[8]Re Fuld'd Estate, [1968] P 675, 695.

We cannot say that the distinction between substance and procedure is so explicit in public international law. In the argument Sir Hersch Lauterpacht took a position arguing that: “(...) the procedural rules represent the element of convenience and certainty in law, and in the prosecution of rights. Thus conceived, they are often regarded as embodying an element of substantive justice (…)” (Vincent, Guinchard, 1999).

In the same spirit, Shabtai Rosenne also stated: “(...) that international law does not place a clear distinction between substantive and procedural law in so far as regular legal procedures exist for the judicial settlement of international disputes, their norms are indistinguishable, in their creation as in their effect, from those substantive norms through the application of which that dispute will be settled (…)” (Rosenne, 2016).

We note a certain difficulty of definition when we try to understand the procedural side which includes the elements of the judicial procedure in the application of the primary rules in international law, which determine the relative consequences of the violations of primary rules (Brown, 2009). As an international controversy we can characterize a given fact of a part of a state or international organization. In this sense the courts are the product of an international instrument which are competent to apply international law and the international courts and tribunals share

the relevant procedural approach.

Common rules in international procedural law are considered as a matter for dealing with other bodies with similar constitutional instruments. This practice represents the concept of precedent (stare decisis) and it is natural that judges of international tribunals try to analyze whether the issue they have to decide has been considered previously and under what terms (Shahabudden, 1996).

The theory of stare decisis is applied by international law and by Art. 59 of the StICJ.[9] Many international tribunals have declared that they are not bound by decisions that come from the past (Anboni, 2013).[10] Thus, an international tribunal considers a

[9]ICJ Statute, art. 59 "(…) the decision of the Court has no binding force except between the parties and in respect of that particular case (...)".

[10]Bayindir Insaat Turizm Ticaret Ve Sanayi AS v. Pakistan, ICSID Case No. ARB/ 03/29, decision of 14 November 2005, para. 76: "(…) Tribunal agrees that it is not bound by earlier decisions, but will certainly carefully consider such decisions whenever appropriate (…)". AES Corporation v. The Argentine Republic, ICSID Case No ARB/02/17, decision of 26 April 2005, para. 30-33. SGS Sociètè Gènèrale de Surveilance v. Philippines (ICSID Case No ARB/02/6, decision of 29 January 2004, para. 97: "(…) although different tribunals constituted under the ICSID system should in general seek to act consistently with each other, in the end it must be for each tribunal to exercise its competence in accordance with the applicable law (…)".

certain reasoning persuasive where the authority inevitably encourages the adoption of an approach by other international bodies (Lauterpacht, 1976; Shany, 2003).

Sir Hersch Lauterpacht has considered the doctrine of precedent as non-binding and states: “(...) the court follows its own decisions for the same reasons for which all courts-whether bound by the doctrine of precedent or not-do so, namely, because such decisions are a repository of legal experience to which it is convenient to adhere; because they embody what the Court has considered in the past to be good law; because respect for decisions given in the past makes for certainty and stability, which are of the essence of the orderly administration of justice; and (a minor and not invariably accurate consideration) because judges are naturally reluctant, in the absence of compelling reasons to the contrary, to admit that they were previously in the wrong (…)” (Lauterpacht, 1976).

The constituent instruments and rules, that are adopted by international tribunals, are silent on the question of procedure where international tribunals exercise functions, that are similar to and may relate to the jurisprudential practice of other bodies. The international courts have thus authorized to apply the procedure and exercise the related power for the procedure, that is applicable as a general principle of procedural law and as an

intrinsic power (Brown, 1999).
Consequently, the clean hands doctrine is a procedural principle that resolves the defense that various international judicial bodies raise since it refers to previous rulings, which are variously relevant and applicable.

The general principles of international law from the jurisprudence of the ICJ

When we talk about general principles of law we are talking about a nucleus of rights that have passed from Roman and national law and are integrated into international law, as a sort of historical background of a uniform legal nature, which also finds its basis through the jurisprudence of the ICJ.
These are rules where national governments have an importance in the life of international relations as fundamental principles where the reason for the characteristics that structure international society is justified. These principles form a process of rules of international law that diminish the passage of time that the rules of international law can attest to the direct reference from state practice. This means that these principles are the protagonists of the contemporary international society (Friedmann, 1963).
There are many rules of general international law which now

influence certain general principles, since they reflect the conceptual schemes of the legal practice of national society, especially those which influence the tradition of Roman law.

The role that general principles of law play in the formation of international rules has regressed in contemporary international law. Their transfusion is retained into the internal orders of international society.

The general principles refer to the first arbitrators. Dating back to 1905 and specifically in the case of arbitration between France and Venezuela in the Antoine Fabiani case, it was stated that: "(...) the general principles of the law of nations on the denial of justice" are "rules common to most legislations taught by doctrines (…)" (Di Stefano, 2019).[11]

Only with Art. 38, par. 1, letter c) the Statute of the permanent court has enshrined and affirmed the principles that should apply by civilized nations (Gaja, 2013; Kolb, 2013). This is a statement that is now found in Art. 38 of the Statute of the ICJ where the principles are derived from main traditions of national civil law (Waldock, 1962; Cheng, 1987).

The preparatory works of the Statute showed the divergence of opinions, in this regard. Descamps as president of the Advisory

[11]Antoine Fabiani Case, (France v. Venezuela), X RIAA 83, V Moore Intl Arbs 4878, 31 July 1905, Mixed Claims Commission.

Committee stated that: "(...) to include among the rules that the Court could apply "the rules of international law as recognized by the legal conscience of civilized nations.[12]

The objective justice has a twofold confirmation, i.e. in the concurrent teachings of juris consults of authority and in the public conscience of civilized nations.[13]

The US representative, E. Root stated that: "(...) this reference was too broad with the consequence that the court would be authorized to apply principles, differently understood in different countries.[14] However, the phrase "general principles of law recognized by civilized nations.[15]

The Brazilian representative, M Fernandes, held another position, sustaining: "(...) those principles of international law which, before the dispute, were not rejected by the legal traditions of one

[12]PCIJ: Advisory Committee of Jurists Procès-verbaux of the Proceedings of the Committee, June 16th-July 24th 1920.

[13]PCIJ, Advisory Committee of Jurists Procès-verbaux of the Proceedings of the Committee, June 16th-July 24th 1920, par. 324.

[14]PCIJ, Advisory Committee of Jurists Procès-verbaux of the Proceedings of the Committee, June 16th-July 24th 1920, par. 308. Lord Phillimore affirmed that: "(…) all the principles of common law are applicable to international affairs. They are in fact part of international law (...)" (ibid, p. 316).

[15]PCIJ, Advisory Committee of Jurists Procès-verbaux of the Proceedings of the Committee, June 16th-July 24th 1920, par. 334.

of the states concerned with the dispute (…)".[16]

Lord Phillimore also stated that: "(…) the general principles referred to (…) were those which were accepted by all nations in *foro domestica*, such as certain principles of procedure, the principle of good faith (*bona fide*) and the principle of *res iudicata* (…)".[17]

The French delegate, M de Lapradelle recognized that: "(...) the principles which formed the bases of national law, were also sources of international law (…) preferable to keep to a simple phrase, such, for example, the general principles of law, without indicating exactly the sources from which the principles should be derived (…)".[18]

It is understood that art. 38 highlights the general principle that it considers to be part of international law because such principles also occur in national systems (Gaja, 2013). Obviously, not all general principles are present in national legal systems and are part of international law.

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[16]PCIJ, Advisory Committee of Jurists Procès-verbaux of the Proceedings of the Committee, June 16th-July 24th 1920, par. 346.

[17]PCIJ, Advisory Committee of Jurists Procès-verbaux of the Proceedings of the Committee, June 16th-July 24th 1920, par. 335.

[18]PCIJ, Advisory Committee of Jurists Procès-verbaux of the Proceedings of the Committee, June 16th–July 24th 1920, par. 335-336.

The difference between international society and Nations[19] makes the transposition of the typical principle of domestic law inappropriate. This principle finds its origin in international law in the principle of systems with greater traditional development than the national ones (Wolfke, 1993).[20]

Within this context, we recall the Factory at Chorzòw case of the Permanent Court of International Justice (PCIJ) where it was stated that: "(…) it is (…) a principle generally accepted in the jurisprudence of international arbitration, as well as by municipal

[19]The general principles in international law are compatible with the essential characteristics deriving from the international legal system. They are principles that operate within systems that have a legal nature and different bases that can be integrated into the international legal corpus.

[20]In our opinion, the general principles of international law must have certain conditions which must be applied uniformly in most states of the international community. This condition necessarily characterizes and obliges the values and behaviors that states consider necessary at the international level. The general principles of law recognized by civilized nations constitute a *sui generis* category that form part of international customary norms such as, for example, *diuturnitas* which represents and provides for the internal legal systems of states in a uniform manner. With regard to the *opinio iuris sive necessitatis*, it is characterized by rules of justice, i.e. of a procedural nature that have a history in Roman law. Rules that are understood by the organs of the state that have universal value and are applicable in legal systems of an international nature.

courts, that one party cannot avail himself of the fact that the other has not fulfilled some obligation or has not had recourse to some means of redress, if the former party has, by some illegal act, prevented the latter from fulfilling the obligation in question, or from having recourse to the tribunal which would have been open, to him (…)".[21] This position has found basis in the Gabčíkovo-Nagymaros project (Thouvenin, 1997).[22]

Later in the Corfu Channel case we noticed that in the: "(…) exclusive territorial control of a state within its frontiers the other state, the victim of a breach of international law, is often unable to furnish direct proof of facts giving rise to responsibility. In such a state should be allowed a more liberal recourse to inferences of fact and circumstantial evidence. This indirect evidence is admitted in all systems of law and its use is recognized by international decisions (…)" (Wright, 1949; Di Stefano, Henry, 2012).[23]

It is immediately clear that the ICJ referred to the general principle of law that exists in national legal systems as we also

[21]PCIJ, Factory at Chorzòw case (Federal Republic of Germany v. Poland), P.C.I.J., Series A, 26 July 1927, No. 9, para. 31.

[22]ICJ, Gabčíkovo-Nagymaros Project (Hungary v. Slovakia), 25 September 1997, ICJ Reports 1997.

[23]ICJ, Corfu Channel Case (United Kingdom of Great Britain and Northern Ireland v. Albania) ICJ Reports 1949 (Merits), 9 April 1949, para. 18.

noted in the Temple of Preah Vihear case when the ICJ stated that: "(…) an established rule of law that the plea of error cannot be allowed as an element vitiating consent if the party it contributed by its conduct to the error, or could have avoided it, or if the circumstances were such as to put that party on notice of a possible error (…)" (Ciorciari, 2014).[24]

Different approaches adopted regarding legal issues in national legal systems, thus, making it difficult to ascertain the existence of a general principle. Even in this case the doubt remains as Kelsen stated: "(…) such principles common to the legal order of the civilized nations exist at all (…)" (Kelsen, 1966).

It is also recalled by the ICTY in the Tadić case that: "(…) national legislation and case law cannot be relied upon as a source of international principles or rules, under the doctrine of the general principles of law recognized by the nations of the world. For this reliance to be permissible, it would be necessary to show that most, if not all, countries adopt the same notion (…) it would be necessary to show that, in that case, the major legal systems of the world take the same approach to this notion (…)" (Nicholson, 2018).[25]

[24]ICJ, Temple of Preah Vihear (Cambodia v. Thailand), 15 June 1962, I.C.J. Rep. 1962, para. 26.

[25]ICTY, Prosecutor v. Tadić (Opinion and Judgment), 7 May 1997, para. 225.

In the BP Exploration Company (Libya) Limited v. Government of the Libyan Arab Republic arbitration, the arbitrator decided that: "(…) in accordance with the principles of the law of Libya common to the principles of international law and in the absence of such common principles (…) and in accordance with the general principles of law, including such of those principles as may have been applied by international tribunals (White, 1981)[26] (…) the plaintiff company had the right to compensation but not to restitution, which would have been granted in some municipal systems, because a rule of reason (…) dictates a result which conforms both to international law, as evidenced by state practice and the law of treaties, and to the governing principle of English and American contract law (…)".[27]

On investment matters (ICSID) in the Amco Asia Co v. Republic of Indonesia case (Amco v Indonesia), the panel stated that: "(…) the full compensation of prejudice, by awarding to the injured party the *damnum emergens* and the *lucrum cessans* is a principle common to the main systems of municipal law, and therefore, a general principle of law which may be considered as a source of

[26]British Petroleum Exploration Company (Libya) Limited v. Libya, BP/Libya Concession Tribunal (merits), 1979, par. 353.

[27]British Petroleum Exploration Company (Libya) Limited v. Libya, BP/Libya Concession Tribunal (merits), 1979, par. 354.

international law (…)".[28]

Within this context, the ICJ considered and held that there is no general principle of law which can be perfectly applied to the relevant issues.

Therefore, the ICJ in the South West Africa case observed: "(...) the requesting state was equal to plea that the court should allow the equivalent of an "*actio popularis*", or right resident in any member of a community to take legal action in vindication of a public interest. But although a right of this kind may be known to certain municipal systems of law, it is not known to international law as it stands at present; nor is the court able to regard it as imported by the general principles of law referred to in Art. 38, paragraph 1 (c), of its Statute (…)".[29]

This position was inspired by the consultative procedure Application for Review of Judgment No 158 of the United Nations Administrative Tribunal, where it was established that a: "(…) general principle of law which requires that in review proceedings the interested parties should necessarily have an

[28]Amco Asia Co v. Republic of Indonesia, ICSID Case No. ARB/81/1, 20 November 1984, para. 267.

[29]ICJ, South West Africa Cases (Ethiopia v. South Africa; Liberia v. South Africa) [Second Phase], ICJ Rep No. 46 and 47, sentence of 18 July 1966, para. 88; South West Africa/Namibia (Advisory Opinions and Judgments), 21 June 1971.

opportunity to submit oral statements of their case to the review tribunal. General principles of law and the judicial character of the court do require that, even in advisory proceedings, the interested parties should have an opportunity, on a basis of equality, to submit all the elements relevant to the questions which have been referred to the review tribunal (…)".[30]

The ICJ perhaps for the first time highlighted some principles that are relevant in international law and which have no basis in national law. As for example in the Corfu Channel case the ICJ stated that: "(...) the obligation to notify the existence of a minefield in their territorial waters and to warn approaching ships of the imminent danger (...) are based (…) on certain general and well-recognized principles namely: elementary considerations of humanity, even more exacting in peace than in war; the principle of the freedom of maritime communication; and every state's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other states (…)".[31]

Continuing with the Frontier Dispute case, the ICJ took into consideration that: "the principle of *uti possidetis juris*" is "a

[30]ICJ, Application for Review of Judgment No 158 of the United Nations Administrative Tribunal, consultive order of 12 July 1973, I.C.J. Rep. 1973, para. 36.

[31]ICJ, Corfu Channel Case (United Kingdom of Great Britain and Northern Ireland v. Albania), op. cit., par. 22.

fairly established principle of international law where decolonization is concerned (...) and as a general principle, which is logically connected with the phenomenon of the obtaining of independence, wherever it occurs".[32]

This type of references by the ICJ to principles that are not part of domestic laws can be explained precisely in customary international law by Art. 38, par. 1, letter. b) of the Statute of the ICJ (Kolb, 2013). The custom is now considered as: "(...) evidence of a general practice accepted as law (...) given the insufficiency of the practice in certain sectors, however, various norms of international law which are not contained in treaties would not fall within the definition of custom (…)" (Harrison, 2024). Perhaps this is how the history of general principles was "born".

Already, Art. 38 par. 1 letter c) of the Statute of the ICJ specified: "(...) that the general principle is such if recognized by civilized nations (…). A given principle is found only in international law. Its recognition would reflect the attitude taken towards it by the international community, and therefore, essentially, by the states (…)".

Continuing with the Frontier Disputes case, the ICJ stated that:

[32]ICJ, Frontier Dispute Case (Burkina Faso v. Republic of Mali), 22 December 1986, I.C.J. Rep., 554, par. 15.

"(…) the numerous solemn affirmations of the intangibility of the frontiers existing at the time of the independence of African States, whether made by senior African statesmen or by bodies of the Organization of African Unity itself, are evidently declaratory rather than constitutive. They recognize and confirm an existing principle, and do not seek to consecrate a new principle or the extension to Africa of a rule previously applied only in another continent (…)".[33]

Among the sources of Art. 38 of the Statute of the ICJ the general principles of law are broad and of various interpretations. They can also integrate other norms of international law, both conventional and customary, thus contributing to filling the relative gaps that are created. Lord Phillimore also noted this approach during the preparatory work of the Statute. The order mentioned simply represented the logical one in which these sources would occur to the mind of the judge.[34]

The general principles are applied in domestic law constituting an auxiliary source of international law where recourse could be presented only in the absence of applicable rules from a secondary or primary source.

[33]ICJ, Frontier Dispute Case (Burkina Faso v. Republic of Mali), 22 December 1986, I.C.J. Rep., 554, par. 24.

[34]PCIJ, Advisory Committee of Jurists Procès-verbaux of the Proceedings of the Committee, op. cit.

The general principles constitute a juris analogy that seeks to fill what remains and is created by treaty or customary law. This reference to principles in domestic legal systems considers that the jurisprudence of the ICJ presents itself as a reservation that seeks to avoid the danger of a *non liquet* avoiding the relative lack of particular or general rules, that are applicable to the relevant claims, that advance the specific controversy, that refuses to make the decision final (Lauterpacht, 1958; Stone, 1958; Siorat, 1959).

General principles constitute (Kolb, 2006) a primary source of international law, as legal premises from which the decision of disputes can be drawn and which respects as a result the relative recourse to conventional or general rules, that apply to a concrete case.

The ICJ is a clear application tool of the progressive development of international law through its own jurisprudence (Lauterpacht, 2000). We note the relationship between general principles and good faith where the ICJ in the Nuclear Tests, Border and Transborder Armed Actions and Nicaragua cases took into consideration how “trust and confidence” are “inherent in international co-operation” and the principle of good faith is “one of the basic principles”, that regulate the formation and application of contractual obligations as well as their

interpretation (Miles, 2017).[35]

Good faith materializes in the procedural field and undertakes the correct functioning of the relevant procedure. It constitutes the basis for the prohibition of abuse of process as well as the application of procedural estoppel and of the *nemo commodum capere potest de sua ptoprio turpitude* (Kolb, 2006), that functions in a similar way to the principle of estoppel both at a substantial and procedural law level.

The principle of estoppel thus presents itself as a claim of a certain fact or a certain legal issue where the previous mistake committed during a dispute benefits. Thus, one is not allowed to reap the fruits of incorrect conduct.

This is an illicit act where it substantiates the conduct that proves simple negligence. A state cannot invoke the relevant objection that it may support as enforcement of one of its international obligations. It is a procedural law principle of a range of applications that characterizes the relative flexibility of the general principles.

[35]ICJ, Nuclear Tests (Australia v. France), Judgment, 1974 ICJ Reports 253, 20 December 1974, para. 46 and 49. Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America), 27 June 1986, I.C.J. Rep., 1986, para. 63, p. 419. Border and Transborder Armed Actions (Nicaragua v. Honduras), Jurisdiction and Admissibility, Judgment, 1988 ICJ Reports 68, 20 December 1988, para. 94, p. 105-106.

The clean hands doctrine is certainly connected with *bona fide* and the rule that prohibits the benefit of illicit conduct (Lauterpacht, 1982; Shaw, 2012; Brownlie, 2019).[36]

General and procedural principles according to international law

Since the Jay arbitration of the 18th century, the presence of a jurisprudential body recognizes and affirms a series of rules and general principles that we have already seen in the previous paragraph. It is a statement of rules that is contested (Thirlway, 2013) from international courts, i.e. from jurisprudence but also by arbitration and judicial management of disputes (Kolb, 2006). The problems that are noted have to do with the general principles that respect the simple judicial rules in this sector as well as those principles of a procedural nature. In this sense, we cannot say that general consensus exists. The true nature of the procedural principles, according to the authors opinions, also include jurisdiction that it has been definitively pre-established by the statutes of the international tribunals (Kolb, 1999).

[36]PCIJ, Legal Status of Eastern Greenland (Denmark v. Norway), PCIJ Series A/B No. 53, 5 September 1933 (dissenting opinion of judge Anzillotti) and Diversion of Water from the River Meuse (Netherlands v. Belgium), 1937, PCIJ (Ser. A/B), No. 70, 28 June 1937, para. 25.

The principle of law has a general normative basis which includes in its being all the rules that are specific and expressed in detail. This principle constitutes a constitutional type of a legal system that expresses itself as a founding legal value. This principle covers the legal reality in an unlimited way without specifying *a priori* the conditions that have to do with its application and its legal effects (Kolb, 2006).

We can, thus, speak for a not wide but concrete circle of the principle which has its basis in similar and connected concepts such as the principle of *bona fide*, *pacta sunt servanda*, estoppel, *nemo ex proprio turpitudine commodum capere potest*, abuse of law, abuse of process, etc. (Ovchar, 2009).

The principles play a role that does not facilitate the application of a specific case. They do not have an equitable function that comes into conflict and struggle with normative law. These principles, therefore, play an important role for legislative development allowing the creation of new rules. Their specific role in the formative phase of new rules has a dynamic function for the jurisprudence and especially in the application of the law allowing thus the principles to be presented as a source of the law.

The difference between general and procedural principles is also based on the rule of constitutional role which has its own limiting

scope. There is no distinction between principles and rules as we can see. Therefore, a gray area, a general rule which is qualified as a strict and important principle, is noted.[37]

The definition of the procedural notion *lato sensu* covers the relevant rules that have to do with international judicial action. They are included rules governing the relevant composition of the court, jurisdiction and admissibility, the objective and subjective conditions that are part of a complaint as well as the modalities based on the relevant elements that are dealing with in the case before the ICJ.[38]

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[37]The expression *audiatur et altera pars in judicio* can be interpreted as a type of principle, as a value of a procedural nature which is also considered as part of a principle.

[38]The rules of the ICJ which are part of the applicable procedural rules are the following: -rules which are part of the organization of the court itself, eg. composition of the venue, deliberation of the judges, etc; independent of any specific procedure; - norms that are part of the jurisdiction of the court, such as for example the dispute that has a legal nature, the consent of the parties, etc; - rules that have to do with the admissibility of a concrete request such as lis pendens, the absence of conditions that go as far as the exhaustion of local remedies, etc; norms that have to do with merit; - rules of a procedural nature which are established by the same regulation of the court. These are rules that belong to the category of incidental proceedings such as for example provisional measures according to Art. 41 of the Statute of the ICJ. Rules that are based on proceedings that have a contentious

General principles of procedural law cover all types of judicial, quasi-judicial and arbitral proceedings (Kolb, 2006). In practice we note the common principles included in the ICJ, international arbitration forums both interstate and commercial as well as international tribunals such as ECtHR, ITLOS, ICC, etc. and bodies such as the Human Rights Committee.

Interesting are the procedural principles that apply to the ICJ. Of great importance is also the way they are found in the practice of other bodies that are grouped into other categories (Bustamante, 1925; Schwarzenberger, 1957).[39] These are for example the constitutional and structural principles that include the equality principle between the parties according to the *audiatur et alter pars*, as well as the principle of the correct administration of justice. They are also part of them the *strictu sensu* principles that are understood and concern the division of tasks between the parties participating in the dispute and the court.

We can recall the principles that have to do with the burden of proof, the *iura novit curia* principle, the *ne ultra petita* principle, the free evaluation of evidence by the judge, as well as the principles that are substantial and related to the procedure. Of

nature as well as consultative nature.

[39]According to Schwarzenberger, "(…) individual parties to cases before the court have a limited choice: they may take the Statute as they find it or leave it (…)".

course, some principles concern sentences that have to do with the ICJ, such as the principle of *res judicata,* which indicates the reasons on which the relevant decision is based. The latter is also the main subject of provisions according to the Statute of the ICJ, i.e. of Articles 56 and 59 (Kolb, 2013; Zimmermann, Tams, Oellers Frahm, Tomuschat, 2019).

The above principles are substantive for the general international law since they are applicable to procedural aspects. These principles are presented as a description of the fundamental behavior of the parties. They are inspired according to the principle of loyalty between the parties and include the prohibition of abuse of process, estoppel and the *nemo commodum capere potest de sua proprio injuria*. They are principles that originate from and are part of the principle of *bona fide* where the parties must take inspiration from each other when undertaking judicial proceedings.

Procedural principles in the field of international law such as the estoppel and the *nemo commodum capere potest de sua proprio injuria* are relevant given that the estoppel draws a boundary that respects the theory of clean hands and the *maxim nemo commodum capere potest de proprio injuria*.

Within this context, the ICJ stated that: “(…) fairness is a general

principle directly applicable as law (…)".[40] The applicant's complaint may be rejected on the basis of his unlawful conduct in relation to the complaint itself. This concept is precisely known as clean hands doctrine (Lauterpacht, 1947; Cheng, 1987; Crawford, 2019; Brownlie, 2019).[41]

Concluding our statements on general and procedural principles we recall the words of Sir Gerald Fitzmaurice who stated: "(…) who comes to equity for relief must come with "clean hands" (…) a state which is guilty of illegal conduct may be deprived of the necessary *locus standi* in *judicio* for complaining of corresponding illegalities on the part of the other states, especially if these were consequential on or were embarked upon in order to counter its own illegality-in short were provoked by it (…)" (Fitzmaurice, 1957).

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[40]ICJ, Continental Shelf (Tunisia v. Lybian Arab Jamahiriya), 24 February 1982, I.C.J. Rep. 1982, para. 71.

[41]According to Cheng: "(…) a party who asks for redress must present himself with clean hands (...)". According to Brownlie: "(…) the clean hands doctrine under international law is a principle according to which a claimant's involvement in activity illegal under either municipal or international law may bar the claim (...)". According to Lauterpacht: "(…) the principle *ex injuria jus non oritur* is one of the fundamental maxims of jurisprudence. An illegality cannot, as a rule, become a source of legal right to the wrongdoer (…)".

“He who seeks equity must do equity”: Common law and principle of equity

Remaining on the principle of equity and on the statute law of the common law system we can say that primary sources are those that create jurisprudence. The statute law, has a very important nature because it always remains subject to the interpretation of the judge.

Within this context, we remember the extra legal sources of law, i.e. the autonomous sources that are left to the subjects who belong to various sectors of activity, especially in the work sector. The principles of the constitutional order are thus sought in common law and statutes.

The principle of equity in the English legal system as well as in the common law system in writing reflects the logic that finds its source in the history of procedures. The equity is placed in the sector of law that determines and prevails in a non-formal way in the technical schemes of the common law and in the contrast between common law and equity which brings the jurisprudential system of Roman law very close to the contrast between *ius civili* and *ius honorarium* or *ius praetorium.*[42]

[42]We mention Enrico VIII (1509-1547), who he embezzled from the Chancery to be transferred to the common lawyers. We remember the Doctor and Student of Christopher Saint-Germain at the time trying to

The principle of equity presents itself as a stabilization process which is analogous to that of common law and which transforms and structures judicial cases, institutions and doctrines in a complex way. In times the equitable remedy becomes very different and outlines the Court of Chancery in its transformation in the formal, technical sense when the reform always followed in the sector of the judicial system has undermined the distinction in the common law and equity judges, thus entrusting to the courts the relative application of both.[43]

The use of the forms of actions are replaced by the form of claim form. This form addressed, as a legislative key, the relationship between common law and principle of equity, that leads to a relative fusion or to a single type of process, already present in the Supreme Court of Judicature (Consolidation) Act of 1925. It modified over time by the County Courts Judicature Order of 1991, the Justice of the Peace Act of 1997 and the Access to Justice Act of 1999.

The Constitutional Reform Act of 2005 introduced the system,

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rationalize the principle of equity in this way.

[43]See the Judicature Acts (1873-1875) that unified the judicial organization of the Supreme Court of Judicature. They were divided into two levels: the first degree which is composed of a civil college (High Court of Justice) and a criminal one (Crown Court), which is divided into several sections; the second degree was the Court of Appeal.

which presents in a clear separate way the powers and the judicial competences of the Lord Chancellor (Lord Chief Justice for England and Wales). The remaining jurisdictional functions passed from the House of Lords to the new Supreme Court of the United Kingdom, that was responsible for conflicts of jurisdiction.[44]

Even in the system of the United States, equity has constituted a separate field of law, which is administered by different judges. We can take into consideration Art. III, cl. 1, sec. 2 of the Federal Constitution which refers to jurisdiction in cases of disputes that are resolved according to law and equity.[45]

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[44]The dichotomy between common law and equity by Anglo-Saxon judges receives protection of an equitable nature by the relative specialists of this type of procedure, as we also see in trust cases.

[45]See Article III, cl. 1, section 2 of Judicial Branch that affirms: "(…) judicial power shall extend to all cases, in law and equity, arising under this constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; (…) to all cases affecting ambassadors, other public ministers and consultants; (…) to all cases of admiralty and maritime jurisdiction; (…) to controversies to which the United States shall be a party; (…) to controversies between two or more states; (…) between a state and citizens of another state; (…) between citizens of different states; between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens or subjects. In all cases affecting ambassadors, other public

The fusion of the system was made according to the reform of 1848 by the State of New York in a rigorous and strict way. In such a way the equity principle passes to the judge who is competent to apply it.[46]

The principle of equity has been understood in international law as well as in national legal systems (Lowe, 1989). Recalling the

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ministers and consultants, and those in which a state shall be party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress shall make. The trial of all crimes, except in cases of impeachment; shall be by jury; and such trial shall be held in the state where the said crimes shall have been committed; but when not committed within any state, the trial shall be at such place or places as the Congress may by law have directed (…)".

[46]Federal Rules of Civil Procedure 1938 as amended. Trying to find the clean hands doctrine unfortunately they have not been included among the maxims, that are codified in California law, which in practice has followed a civil law path as we have seen in the following cases: Conrad v. Lindley 2 Cal. 173 (1852). The District Court of Appeal in California in Kofsky v. Smart and Final Iris Company case, 131 Cal. App. 2d, 531, 281 P.2d at 6. (1955), affirms: "(…) plaintiff had violated the Unfair Practices Act of the state of California, would the unclean hands doctrine, to wit, that equity will not aid one party or another to a transaction which is illegal or contrary to public policy where the parties are equally at fault, but will leave them just where it finds them, apply so as to prevent the granting of the preliminary

expressions of Holder and Brennan, equity is synonymous with "the spirit of the law" (Holder, Brennan, 1927) since it includes the general principles of justice, which are also part of national systems.

In common law systems, Sir Frank Kitto tried to give a definition of equity: "(…) the Chancellors might proceed, like the judges, (…) according to the rule of equity (...) wherever the common law might seem to fall short of that ideal in either the rights it granted or the remedies it gave. For the exercise of the latter power they had no guidance or point of reference save in their own opinions as to the standards of conscientiousness to which the conduct of other people should be required to conform; for "equity" was as vague as *aequum et bonum* (…)" (Meagher, Heydon, Leeming, 2002).

Instead, in civil law systems, codification contrasts with the development of a path for the creation of jurisprudential law.

The path followed deals with some general clauses that offer a fair interpretation in the statutory provisions against the rigorous and formalistic interpretation of the various codes (Friedmann, 1967). This applies to exponents of national law such as Grotius and Pufendorf who took equity into consideration as a tool that is capable of correcting and improving the jurisprudential history of

injunction in favor of the defendant (…)".

positive law (Grotius, 1715; Grotius, 1735; Von Pufendorf, 1749).

As for common law jurists, Phillimore and Root considered sources of law that are limited to conventions and customs. Their goal was to induce more countries to accept the relevant jurisdiction of the court as well as to avoid excessive discretion in the hands of judges. The representatives of the legal systems were based on the path that avoided the pronouncement of *non liquet* as a situation where a court was unable to resolve a dispute due to the relevant regulatory gap.[47]

The principle of equity plays aν important role in jurisprudential history and in international law given that equity is presented as a source that is independent of international law given the meanings and the different historical-temporal contexts in which it is applied (Van Dijk, 1989).

The path of compromise must satisfy the needs of the exponents of the common and civil law systems that offer important content for the general principles (Alland, 2021).

Within this context, we recall that the principle of equity was also addressed by the Hudson judge in the Diversion of waters from the Meuse river case. In Article 38 of the Statute, “the Court has

[47]PCIJ, Advisory Commitee of Jurists, Procés-Verbaux of the Proceedings of the Committee, op. cit., pp. 293-297.

some freedom to consider principles of equity as part of the international law which it must apply (…).[48]

It seemed important the principle of equity when two parties have assumed an identical or a reciprocal obligation. In such a case, the one party which is engaged in a continuing non-performance of that obligation should not be permitted to take advantage of a similar non-performance of that obligation by the other party.

The principle finds expression in the so-called maxims of equity, which exercised great influence in the creative period of the development of the Anglo-American law. Some of these maxims are, "equality is equity"; "who seeks equity must do equity". A very similar principle was received into Roman Law (…)".[49]

These are words that we have also seen confirmed by judge Anzilotti when back in 1920 during the editorial team of the Statute of the ICJ declared that: "(...) one who seeks equity must do equity". "So just, so equitable, so universally recognized, that it must be applied in international relations (…)". It is one of the general principles of law recognized by civilized nations (…)".[50]

[48]PCIJ, Diversion of Waters from the River Meuse, (Netherlands v. Belgium) op. cit., para. 4.

[49]See the dissenting opinion of judge Hudson.

[50]PCIJ, Diversion of Waters from the River Meuse, (Netherlands v. Belgium) op. cit, par. 50.

In the arbitrators of the Norwegian Ship Owners case, who decided according to law and equity, we saw the statements that according to them: "(…) law and equity (...) cannot be understood here in the traditional sense in which these words are used in the Anglo-Saxon jurisprudence. The majority of international lawyers seem to agree that these words are to be understood to mean general principles of justice as distinguished from any particular system of jurisprudence or the municipal law of any state (…)".[51]

The principle of equity by an international tribunal can be used by the boundaries established by law when a rule is interpreted in various ways. Thus, the equity is applied and ascertained according to the interpretation that is inspired and based on the objectives of the law. Equity is used where the law is silent to bring before the law the intentions of states, that is, in a way that they can be implemented.

The principle of equity *contra legem* goes against what is believed to be a real intention to a specific objective. An international court needs explicit powers to be able to change the law in some way (Lanovoy, 2019; Hauptman, 2021)[52].

The principle of equity as a general principle of law also binds its

[51]Norwegian Ship Owners' Case (U.S. v. Norway), 1 Reports of International Arbitral Awards, 1922, p. 307.

[52]Cayuga, 1926, 6 Reports of International Arbitral Awards, p. 173.

own functioning. Already within this context Rosenne stated that: "(…) fairness does not automatically operate to correct a decision in which the rigorous application of the law results in an unsatisfactory conclusion. A principle of equity can only come into play when it is generally recognized by the laws of "civilized nations" (…)" (Rosenne, 2016).

Within this context, we also remember the Frontier Dispute case where the ICJ stated that: "(...) it would have been unjustified to resort to equity to modify a border established and inherited from the colonial powers (...) rejected that modifying the border could reflect a doubtful concept of fairness".[53] This has been applied as a "general principle".

The judges of the ICJ have rarely expressed, however, themselves in this sense. Rather it seems to be taken for granted that various equitable rules, such as estoppel and the principle that "who comes into equity must come with clean hands" are part of international law and require no further explanation other than their relevance to the specific case (White, 2004).

As we understand, the ICJ did not discuss the principle of equity as an abstract idea. The consultative committee has already demonstrated the differences that are profound between the

[53]ICJ, Frontier Dispute Case (Burkina Faso v. Republic of Mali), op. cit., 554.

representatives of the different legal systems where the content of the principle of equity remains the same as it can be carried out in international decisions. Thus, the number of states that are independent allow the ICJ itself to achieve relative unanimity even in cases that have the problem of equity at their core as well as to "connecting elements of equity with very concrete circumstances" (White, 2004).

Equity refers to the general principles of law recognized by civilized nations, a statement that we have noted since the beginning of our discussion, as well as to the principles of international law.

In the Tehran Case, Iran as the respondent state proposed that the relevant events can only be understood in light of the dispute and the ICJ itself could thus rely on the claims proposed by the United States and not only[54].

At the time the judges involved in the case stated that in the present case "(…) never has the view been put forward before that, because a legal dispute submitted to court is only one aspect of a political dispute, the court should decline to resolve for the parties the legal questions at issue between them (...)"[55].

[54]ICJ, Teheran Case (United States of America v. Iran), ICJ Rep 1980, para. 20 (dissenting opinion of judge Taranzi).

[55]ICJ, Teheran Case (United States of America v. Iran), ICJ Rep 1980, para. 20.

There is thus a contrast between the Iranian path and the one that was followed by the ICJ itself which reflects the principle and the law. The problem does not exclude and does not take as irrelevant series of contingent circumstances. The complex relationship that presented this one-dimensional path is transformed, because the principle of equity allows the judging body to base itself on all the circumstances that exist the concrete case (Lowe, 1989).

From the rigorous regulatory system to the principle of equity the consensus of the expansion of the present investigation makes the principle of the equity to adapt and follow a path multitude of gaming interests that are not contemplated with specific rights and duties (Nader, Starr, 1973).

The clean hands theory in the American and English common law systems

A general rule between the principle of equity and the common law is part of a preliminary condition that bases the remedy: "(…) to equity with clean hands. If he (the claimant) has acted wrongly morally or legally he will not be helped by a court when complaining about the actions of the other party (Woodley, 2005) (...) the claimant cannot claim successfully if his or her motives are dishonest, or if his or her obligations to the defendant have

not been discharged (…)" (Collin, 2004).[56]

Illicit conduct becomes relevant in the application of the clean hands doctrine and only to behaviors that are connected to the dispute.

Within this confirmation, we remember the Mozley and Whiteley's Law Dictionary which states that: "(...) clean hands are required from a lawyer in equity, i.e., he must be free from reproach, or taint of fraud, etc. in his conduct of him in respect of the subject-matter of his claim of him (…)"(Saunders, 1962).

The clean hands doctrine includes a generic formulation of legal logic that seeks judicial remedy within the spirit of the principle of equity and of a dispute at hand. A causal link between the injury and the defendant is part of the tort, that is first established by the plaintiff. This principle is based on a subject who is not considered for protection in this regard and as a claim who is not "guilt" as is already understood from the principles of Roman law: *ex turpi causa non oritur actio*.

The relationship between the doctrine of clean hands and the principle of good faith shows that no one can benefit from errors

[56]See par. 8 of the Uniform Child Custody Jurisdiction Act which states that a court cannot take a position with a definitive sentence after an application for custody and/or the restoration of rights to one of the parents, who has behaved in bad faith with regard to their rights as a parent towards their own child and/or the other parent.

that are not explicitly clarified (Stein, 1982).[57] Therefore, even oral and written submissions before international tribunals give the impression that the parties use the term clean hands in *bona fide.*[58]

The differentiation between the terms of international law and the clean hands doctrine makes part of the general principles of law. According to the opinion of the Brownlie: "(…) the clean hands doctrine was part of the general international law (…)" (Crawford, 2019).[59]

Within this spirit, Rousseau stated that: "(…) it is not possible to consider the theory of clean hands as an institution of general customary law (…)" (Rousseau, 1983). The clean hands doctrine is a general principle of law in its own right (Ross, 1993). Luis Garcia-Arias stated that: "(…) adjudicated before international tribunals where the doctrine of "clean hands" has been applied directly", but nevertheless admitted that "there are cases where the essence of this doctrine has been alluded to (…)" (Garcia-Arias, 1960).

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[57]"(…) is related to, but admittedly somewhat distinct from the unclean hands doctrine in that it bears directly on the foundation of the plaintiff's right, rather than merely on the availability of a remedy (…)".

[58]ECtHR, Van Der Tang v. Spain of 13 July 1995, para. 363, 381.

[59]Provisional Summary Record of the 2791st Meeting, UN Int'l Comm'n No. 56th Sess, 11.

The term/principle/doctrine of the clean hands, especially in jurisprudence, distinguishes between the principle of good faith and the principle benefiting from the relevant illicit conduct. The doctrine of clean hands as we see in the next paragraphs shows a specific category that expresses the subjective legal status of the parties in cases where the principles mentioned apply (Cheng, 1987).

The principle of equity has been included in various sentences and in a statement dating back to 1787, according to which "who comes into equity must come with clean hands".[60] An expression that was also reinvigorated by Chafee, who stated that this is the "(...) amusing maxim of equity (...)" (Chafee, 1949).

In 1728 Richard Francis, published the Maxims in Equity (Francis, 1791), in which he has affirmed that: "(…) he had committed iniquity shall not have equity (…)" (Luther, 1995).[61] In the same line of thought is Pound (Pound, 1926) stating that: "(...) it seems that it was Francis himself who conceived the maxim, since none of the cases examined by him expressly contemplated it despite achieving the same practical result, denying the plaintiff a remedy (...) the iniquity must have been

[60]Bentley v. Tibbals, 223 Fed. 247, 251 (C.C.A. 2d, 1915), is affirmed that: "(…) is a venerable maxim of equity that one who comes into equity must come with clean hands (…)".

[61]"(…) he who seeks equity must do equity (…)".

done to the defendant himself (…)".[62]

In Dering v. Earl of Winchelsea[63] (Exchequer) Baron stated that: "(…) a man must come into a court of equity with clean hands; but when this is said, it does not mean a general depravity; it must have an immediate and necessary relation to the equity sued for; it must be a depravity in a legal as well as in a moral sense (...)".

The clean hands doctrine was first invoked in 1826 in the District Court of the State of Ohio where it had to address an issue that had to do with the separation of spouses by stating that: "(…) the complainant must come with clean hands and a chaste character, not stained with the same infamy and crime of which she complains (…) to grant relief to either of them would be offering a bounty to guilt (…)".[64]

In 1846 Spence published the first edition of the Equitable Jurisdiction of the Court of Chancery giving a complete and interesting interpretation of the expression: "who seeks equity should do equity", dedicating only one sentence to the doctrine of clean hands (Spence, 1836).[65]

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[62]Jones v. Lenthal, 22 Eng. Rep. 739 (Ch. 1669).

[63]Dering v. Earl of Winchelsea, EngR 39 (1787) 1 Cox 319 (1787) 29 ER 1184.

[64]Mattox v. Mattox, 2 Ohio 233, 233-234 (1826).

[65]Creative Media Partners, LLC, 2008, p. 423 note (a).

In 1874 the relevant expression was “increased” by Bispham (Bispham, 1970). From 1881 Pomeroi recalled and exemplified it (Pomeroy, 1941) writing that: “(...) a universal rule guiding and regulating the action of equity courts in their interposition on behalf of suitors for any and every purpose, and in their administration of any and every species of relief (…) is merely the expression of one of the elementary and fundamental conceptions of equity jurisprudence (…)” (Pomeroy, 1941). This position was taken and used by judge Murphy in the Precision Instrument case where it was stated that: “(…) the clean hands doctrine is rooted in the historical concept of court of equity as a vehicle for affirmatively enforcing the requirements of conscience and good faith (…)”.[66]

For the first scholar of the doctrine Zechariah Chafee Jr there was a modern meaning in the time for the US legal system (Anenson, 2010-2011). He declared, in this regard, that: “(...) the clean hands doctrine (...) ought not to be called a maxim of equity because it is by no means confined to equity (…)” (Chafee, 1949).

In 1949 a significant number of cases were analyzed by him as a basis for the same doctrine (Newcomb Hohfeld, 1913; Pomeroy,

[66]Precision Instrument Mfg. Co. v. Automatic Maintenance Machinery Co., 324 U.S. 806, 814, 65 S. Ct. 993 (1945).

1941; Leigh Anenson, 2018b),[67] but with a broader way (Anenson, 2005; Leigh Annenson, 2010) and newer (Chafee, 1949; Chafee, 1950; Anenson, 2008)[68] respecting other equity defenses that are discretionarily accepted (Newman, 1961; Aneson, 2008).[69]

In the cases examined by Chafee, the clean hands doctrine was

[67]According to Newcomb Hohfeld, "(…) noting maxim of unclean hands to be of "slight importance" compared to other equitable doctrines". Leigh Anneson cited the clean hands doctrine in the Keystone Driller Co. v. General Excavator Co. case 290 U.S. 240, 244-45 (1933): "(...) whenever a party who, as actor, seeks to set the judicial machinery in motion and obtain some remedy, has violated conscience, or good faith, or other equitable principle, in his (or her) prior conduct, then the doors of the court will be shut against him (or her) *in limine*; the court will refuse to interfere on his (or her) behalf, to acknowledge his or (her) right, or to award him (or her) any remedy (...)". The Supreme Court affirms that the: "(…) doctrine is rooted in the historical concept of court of equity as a vehicle for affirmatively enforcing the requirements of conscience and good faith. This presupposes a refusal on its part to be better of iniquity (...)". See also the Bein v. Heath case, 47 U.S. (6 How.) 228, 247 (1848).

[68]According to Anenson: "(…) unclean hands is considerably newer than most equitable doctrines". According to Chafee: "(…) unclean hands "is a rather recent growth" or "a child" beside some other maxims (...) mature in Shakespeare's day". Chief Baron Eyre of the English Court of Exchequer has used the clean hands doctrine in the Dering v. Earlof Winchelsea case, (1787) 29 Eng. Rep. I184 (Ch.) I186; I Cox Eq. Cas. 318, 319-20.

not oriented or included only through illicit, immoral, bad faith conduct related to it (Pomeroy, 1941; Chafee, 1950; Leigh Leigh Anenson, 2018a).[70]

The related judgment with the clean hands doctrine has opened avenues in itself that do not exclude a remedy for the plaintiff (Snow, 2021).[71] These are "roads" that are connected with the *petitum* (De Funiak, 1956).[72] "Unclean hands" conduct must be carried out intentionally[73] involving illicit attitudes and injustices

[69]According to Newman: "(…) relief in the court of the Chancellor was granted according to criteria which were not confined by rules of strict logic or by analogy to prior decisions (...)".

[70]Precision Instrument Mfg. Co. v. Auto. Maint. Mach. Co., 324 U.S., pp. 806, 815, (1945): "(…) misconduct need not necessarily have been of such a nature as to be punisheable as a crime or as to justify legal proceedings of any character. Any willful act concerning the cause of action which rightfully can be said to transgress equitable standards of conduct is sufficient cause for the invocation of the maxim (…)". According to Pomeroy: "(…) the dirt upon his (or her) hands must be his (or her) bad conduct in the transaction complained of (...)".

[71]Morton Salt Co. v G.S. Suppiger Co., 314 U.S. 488, 492-93 (1942). McCullough Tool Co. v. Well Surveys, Inc., 395 F.2d 230, 238 (10th Cir. 1968). Butsee Skil Corp. v. Lucerne Prods. Inc., 489 F. Supp. 1129, 1162 (N.D. Ohio 1980). Mitchell Bros. Film Group v. Cinema Adult Theater, 604 F.2d 852, 864 n.25 5th Cir. 1979.

[72]Loughran v. Loughran, 292 U.S. 216, 229-30 (1934).

[73]New York Football Giants, Inc. v. Los Angeles Chargers Football Club,

in bad faith (Leigh Anenson, Gideon, 2013).[74]
The rationale of the clean hands doctrine includes the logic of the integrity of jurisdiction, justice and public interest.[75] Obviously, any remedy is denied for those who do not have clean hands and constitute a perpetration of abuse in the system (Pomeroy, 1941).
The application of the doctrine is unfair and the court in which it is brought is required to disapply it.[76] Thus, the clean hands

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Inc., 291 F. 2d 471, 474 (5th Cir. 1961); Eresch v. Braecklein, 133 F.2d 12, 14 (10th Cir. 1943).

[74]Johnson v. Yellow Cab Co., 321 U.S. 383, 387 (1944); Keystone Driller Co. v. General Excavator Co., 290 U.S. 240, 245 (1933).

[75]See the Hays' Estate case, 159 Pa. 381, 383, 28 Atl. 158, 159 (1893) affirmed that: "(…) the maxim endeavors to promote and enforce justice, good faith, uprightness, fairness and conscientiousness on the part of those who occupy a defensive position in judicial controversies; but it no less stringently demands the same from the litigant parties who come before it as plaintiffs or actors in such controversies. This fundamental principle is expressed in the maxim (…) he who comes into a court of equity must come with clean hands (…) the maxim (…) is confined to misconduct in regard to, or at all events connected with the matter in litigation, so that it has in some measure affected the equitable relations subsisting between the two parties and arising out of the transaction; with this limitation it furnishes a most important and even universal rule affecting the entire administration of equity jurisprudence as a system of rights and remedies (...)".

[76]Hays'Estate, 159 Pa. 381, 383, 28 Atl. 158, 159 (1893).

doctrine promotes justice[77] as courts use the doctrine precisely to guarantee the relevant results (Leigh Anenson, 2018b).[78]

As regards the conduct of the actor it will be unfair to grant a remedy for the courts which can use clean hands to exclude him. Thus, refusing help to the actor also allows us to exclude "(...) a wrongdoer from enjoying the fruits of his transgression (…)".[79]

The clean hands doctrine also serves as a service to the public interest when taken into consideration the content of the case.[80]

The clean hands doctrine is also applied to deny relief for some circumstances. In particular, when it comes to illicit[81] or immoral[82] conduct.

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[77]Mas v. Coca Cola Co., 163 F.2d 505, 509 (4th Cir. 1947). Dunscombe v. Amfot Oil Co., 201 Ky. 290, 292, 256 S.W. 427, 428 (1923).

[78]Keystone Driller Co. v. General Excavator Co., 290 U.S., 245.

[79]Precision Instrument Mfg. Co. v. Automotive Maintenance Mach. Co., 324 U.S., 815.

[80]Morton Salt Co. v. G. S. Suppiger, 314 U.S. 488, 492-93 (1942). Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134 (1967), Precision Instruments Mfg. Co. v. Automotive Maintenance Mach. Co., 324 U.S. 806 (1945). Republic Molding Corp. v. B.W. Photo Util, 319 F.2d 347 (9th Cir. 1963).

[81]Michigan Pipe Co. v. Fremont Ditch Co., III Fed. 284 (C.C.A. 8th, 1904). Hanley v. Sweeney, 109 Fed. 712 (C.C.A. 9th, 1901).

[82]Deweese v. Reinhard, 165 U.S. 386, 17 Sup. Ct. 340 (1896). National Mercantile Co. v. Keating, 218 Fed. 477 (D. Mont. 1914).

The party to legitimize and ask for a conviction for the tort in a court of equity should be exempt in the relevant accusation of illegality and connected to the relevant subject of the dispute.[83]
The illicit attitude should not necessarily be such to be punishable as a crime[84] given that there is a connected act that can condemn the actor's clean hands.[85]
The illicit conduct of the actor is noted in the Stewart v. Parnell case where the judge stated through an *obiter dictum*: "(...) a court of equity cannot grant a remedy to a *sui juris* party to

[83]National Mercantile Co. v. Keating, 218 Fed. 477 (D. Mont. 1914). A.N. Chamberlain Medicine Co. v. H. A. Chamberlain Medicine Co., 43 Ind. App. 213, 216, 86 N.E. 2025, 1026 (1909), which is affirmed that: "(...) is also well established that if a complainant in a court of equity claims relief against the fraud or imposition of others, he must himself be free from the same charge with reference to the same matter (...)". See also the Hershey v. Weiting case, which is affirmed that: "(…) who comes into equity must come with clean hands in *pari delicto, melior est conditio defendentis*. These are the principles which stand in the plaintiff's way. You come to ask for the cancellation of an agreement which you intended should delay and hinder creditors, and thus violate the statute law of the land, and therefore you cannot be heard in equity. Who does iniquity shall not have equity. If we could entertain your suit, the fraud practiced upon you might be redressed; but equity has no relief for a party who, in the practice of one fraud, has become the victim of another (...)".
[84]Deweese v. Reinhard, 165 U.S. 386 (1896).
[85]Bentley v. Tibbals, 223 Fed. 247 (C.C.A. 2d, 1915).

compensate him for the money invested and lost in a game gambling (…)".[86]

The exception is thus not reported anywhere but the procedure of the immoral conduct that is detected is important given that it is: "(...) an exception that can be raised *ex officio*, in every state and level of the procedure (...)"[87].

The clean hands doctrine in the common law system includes various actions in the absence of defenses for one's defendant (Pound, 1921; Pomeroy, 1941). Already in the United States some courts have tried to interpret it in a restrictive way thus allowing the exception only when both parties shared an intent that was common to commit the offense (Harter, Ordower, 1970)[88] assimilating so in *pari delicto* the relevant *obiter dicta*. Other courts have applied the principle to an extent that is more

[86]Stewart v. Parnell, 147 Pa. 523, 23 Atl. 838 (1892). Smith v. Kammerer, 252 Pa. 98, 25 Atl. 165 (1892), noted that: "(…) the plaintiff, admitting and alleging his own iniquity in the transactions from which the notes, judgments and assignments in this matter arose, be permitted to set up their illegality and with unclean hands invoke this court of equity to relieve him from the effect of his alleged gambling transaction. The general rule in such cases is that equity will leave the parties where it finds them (...)".

[87]Houston v. Graff, 24 C.C. 477 (Pa. 1901).

[88]Cohn v. Pitzele, 117 Ill. App. 342 (1904), aff'd, 217 Ill. 30, 75 N.E. 392 (1905). Mason v. Carrothers, 105 Me. 392, 74 A. 1030 (1909). Kahn v. Walton, 46 Ohio 195, 20 N.E. 203 (1889).

flexible to preclude the relevant remedy and which has placed illicit conduct in relation to the subject matter of the case.[89]

The clean hands doctrine in the American jurisprudential system has found some types of actions such as damage, copyright, infringement and derivative actions.

As far as damage actions concerned, the majority of US courts refuse to apply the doctrine when the plaintiff takes action for compensation for damages (Fadely, 1958).[90]

It is a jurisprudential path that takes into consideration the doctrine developed in equity courts and its application according to the remedies offered in this context (Garvey, 1961; Leigh Anenson, 2018b).[91] In other cases, judges apply the doctrine of damage actions (Lawrence, 1982; Wachs, 2012).[92]

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[89]DanICJer v. Stone, 187 F. 853 (E.D. Okla. 1909). Baker v. Grand Rapids, 142 Mich. 687, 106 N.W. 208 (1906). Whelden v. Chappel, 8 R.I. 230 (1865).

[90]Truitt v. Miller, 407 A. 2d 1073 (D.C. App. 1979). American Nat'l Bank & Trust v. Levy, 83 Ill. App. 3d 933, 404 N.E. 2d 946 (1980). Cusumano v. City of Detroit, 30 Mich. App. 603, 186 N.W. 2d 740 (1971).

[91]Evans v. Mason, 82 Ariz. 40, 308 P. 2d 245 (1957). Rodriguez v. Dicoa Corp., 318 So. 2d 442 (Fla. App. 1975). Caudill v. Little, 293 S.W.2d 881 (Ky. 1956). Cusumano v. City of Detroit, 30 Mich. App. 603, 186 N.W. 2d 740 (1971). Kesinger v. Burtrum, 295 S.W. 2d 605 (Mo. App. 1956).

[92]Tempo Music, Inc. v. Myers, 407 F. 2d 503 (4th Cir. 1969). Kuehnert v. Texstar Corporation 412 F. 2d 700 (5th Cir. 1969). F.E.L. Publications v.

In this sector, the clean hands doctrine as a category of actions can identify some topics such as: a) the merger through the principle of equity and law (Stevens, 1956); b) the severity of the remedies in a strict way with the principle of equity; c) the conduct that does not justify an equitable remedy and does not guarantee a legal remedy. The principle of equity in this sector is developed and created through a path where on the one hand the courts developed rules and principles that are completely different from those of the traditional courts and on the other hand a certain competitiveness is created between the courts and not by a mutual dialogue to resolve disputes.

As a consequence, equity courts seek to correct: "(…) the judgments and judge-made law" that operate from traditional courts in the common law system. The characterizing principles for the systems under investigation are not freely adopted by both parties. The antagonistic competitiveness between systems witnesses a close fusion between law and the principle of equity (Mcclintock, 1948). Already in 1938 the Supreme Court

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Catholic Bishop of Chicago, 506 F. Supp. 1127 (N.D. Ill. 1981). Buchanan Home & Auto Supply Co. v. Firestone Tire & Rubber Co., No. 79-175-9 (D.S.C. July 7, 1981) (order granting dismissal). Urecal Corp. v. Master, 413 F. Supp. 873 (N.D. Ill. 1976). Union Pacific R.R. v. Chicago & Northwestern Railway, 226 F. Supp. 400 (N.D. Ill. 1964). Goldstein v. Lees, 46 Cal. App. 3d 614, 120 Cal. Rptr. 253 (1975).

promulgated the Federal Rules of Civil Procedure where it made this merger official.[93]

The traditional separation persists as courts have taken a different approach based on the question being asked (Davidson, 1978; Huttner, 1979).[94]

Other courts have refused to hold that merger is substantive and not procedural. This argument appears without "value" for substantive rules of equity and which are similar in the common law system (Garvey, 1961) where the substantive law of the principle of equity has significantly influenced the common law system before the formal merger (Stevens, 1956; York, 1974).

The remedies of the principle of equity are considered very distressing for the defendant since compliance with them also means a basis of rigorous applied law (Garvey, 1961). Thus, the request for compensation for damages is permitted as a remedy of strict legal rigor.

The damages claimed are distressing as equity remedies (Garvey, 1961). When requesting non-performance of a contract, a defendant may prefer to perform the performance that respects the monetary compensation. The plaintiff thus requests

[93]The first rules are made and referred to in 28 USC § 2027 (1976) by order of the Court, see also the 308 U.S. 645 (1937).

[94]Ross v. Bernhard, 396 U.S. 531 (1970). Dairy Queen, Inc. v. Wood, 369 U.S. 469 (1962). Beacon Theaters, Inc. v. Westover, 359 U.S. 500 (1959).

enforcement and the judge may allow the defendant to prove the defense of clean hands. If the plaintiff sues for compensation, most courts do not allow the defense of clean hands. If the legal and equity remedies have the same result on the defendant it will be useless to ask the plaintiff to receive a higher relative remedy, because it is illogical: "(…) the same judges to be very moral in a specific performance suit and brutally mathematical in a damage suit (…)" (Chafee, 1950; Wagner, 1986).[95]

The relevant conduct that does not guarantee the remedy of the principle of equity does not guarantee that of a strict, rigorous law. The relative fusion of a right protected by law cannot receive the relative equitable protection and especially where the remedies in strict law and in equity affect the defendant to the same extent (Chafee, 1950; Lawrence, 1982).[96]

Contrary to this argument, are the relevant admitted defenses

[95]Crime, fraud and estoppel are three defenses that in practice can ask the plaintiff to present the clean hands doctrine as a defense.

[96]"(…) difference in the actual nature of the two remedies which the single court has at its disposal (…)".

such as *delicto*, estoppel[97] and fraud,[98] presented as more restrictive options not sufficient to cover all the possibilities that resolve the relevant dispute. The clean hands doctrine is, thus, the only possible defense measure.[99]

Even if the legal defenses are considered and managed in an abstract way to cover all the situations that the clean hands

[97]James Talcott, Inc. v. Associates Discount Corp., 302 F.2d 443, 446 (8th Cir. 1962)). According to the cited case the elements for the defence: "(i) must be appraised of the true facts; (ii) must intend that his conduct be acted upon, or must so act that the party asserting the estoppel had a right to believe it was so intended; (iii) party asserting the estoppel that must have been ignorant of the true state of facts; (iv) party asserting the estoppel that must rely upon the conduct to his injury (…)". Elements that we have seen also in the Santoro v. Carbone case, 22 Cal. App. 3d 721, 99 Cal. Rptr. 488 (1972)).

[98]American Life Ins. Co. v. Stewart, 300 U.S. 203, 212 (1937). Bowmer v. Louis (H.C.), Inc., 243 Cal. App. 2d 501, 503, 52 Cal. Rptr. 436, 437 (1966). Darling v Rose, 301 So. 2d 19, 20 (Fla. Dist. Ct. App. 1974). Smith v Werkheiser, 152 Mich. 177, 179-80, 115 N.W. 964, 965-66 (1908). Henry v. McConnell 400 S.W.2d 344, 346 (Tex. Civ. App. 1966). Wilson v. Byrd, 79 Ariz. 302, 288 P.2d 1079, 1081 (1955). Latta v. Robinson Erection Co., 363 Mo. 47, 59, 248 S.W.2d 569, 576 (1952), which is affirmed as elements for the fraude: "(…) (1) a representation made as a statement of fact; (2) a representation was untrue and known to be untrue by the party making it, or else recklessly made; (3) made with the intent to deceive and for the purpose of inducing the other party to act upon it; (4) the other party did rely in fact;

protects in the principle of the equity, the values included in this doctrine impose an acceptance that is not necessarily "(...) comparable (...) for divestment legal actions for damages (…)".[100] In the Buchanan Home & Auto v. Firestone Tire & Rubber and Fibreboard Paper Products Corp. v. East Bay Union of Machinist[101] cases the courts considered the clean hands doctrine as a legitimate defense in damage actions to achieve the relevant result.

The clean hands doctrine is also invoked for copyright violations (Varadarajan, 2019)[102] including the related limitations of the doctrine. The relative application will be possible only in cases of illicit conduct of the plaintiff and with reference to the *petitum* where the defendant directly requests for the damage suffered

(5) and the other party suffered injury or damage (…)". See also the Farrar v. Churchill case, 135 U.S. 609, 615-16 (1890)).

[99]See the Truitt v. Miller case (Truitt v Miller, 407 A.2d 1073 (D.C. App. 1979). In American National Bank & Trust v. Levy, 83 Ill. App. 3d 933, 404 N.E.2d 946 (1980), para. 948: "(…) it does not affect legal rights (...)".

[100]Buchanan Home & Auto Supply v. Firestone Tire & Rubber Co., No. 79-175-9 (D.S.C. July 7, 1981) (order granting dismissal).

[101]Fibreboard Paper Products Corp. v. East Bay Union of Machinist, 227 Cal. App. 2d 675, 39 Cal. Rptr. 64 (1964).

[102]Harms, Inc. v. Sansom House Enterprises, 162 F. Supp. 129 (E.D. Pa. 1958). Inge v. Twentieth Century-Fox Film Corp., 143 F. Supp. 294, 298 (S.D.N.Y. 1956).

(Olender, 1961).

As an exception to the relevant dicta, American jurisprudence[103] affirms unclean hands despite the evidence that it was not held in the context of a valid defense. In this situation the copyright holder acts with the intention of causing damage to a private individual (Herr, Haydock, Stempel, 2016).[104]

The clean hands doctrine and related actions also include minority shareholders against the relative majority.[105]

Courts in the United States have begun to impose the doctrine of

[103]Alfred Bell & Co. v. Catalda Fine Arts, 191 F.2d 99 (2d Cir. 1951). Inge v. Twentieth Century- Fox Film Corp., 143 F. Supp. 284, 298, 299 (S.D.N.Y. 1956).

[104]Leo Feist, Inc. v. Young, 138 F.2d 972 (7th Cir. 1943), reversing 46 F. Supp. 622 (E.D. Wis. 1942): "(…) it has been held that application of the maxim is not limited to a case where the iniquitous action is one of which the moving party may personally complain (...)".

[105]In particular, the Court of Appeal in Wallersteiner v. Moir case (No. 2) adopted the term "derivative action" which was proposed for related actions which had the intention of settling minority shareholders in the name and on behalf of the company. The related change in terminology had the objective of clarifying the fact that the circumstances of the shareholders do not trigger a personal right but have value as a right that belongs to the general law of the company. The consequences are especially important for shareholders, who thus intend to take a derivative action before and whenever they encounter misconduct and cause damage to the company before they became members.

the clean hands as a requirement and as a requirement on the plaintiff's side (Gower, 1997). If the action is carried out only by a shareholder and in the name and on behalf of the company, it is capable of identifying the reasons for the application of the maxim in the reason of the principle of separate legal personality.[106]

Should the related illicit and illegal conduct of a minority have repercussions on society as a whole? The minority's clean hands are relevant to derivative actions in Towers v. African Tug Co.6[107] and Nurcombe v. Nurcombe[108] cases.

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[106]North West Transportation v. Beatty (1887) 12 App. Cas. 589.

[107]Towers v. African Tug Co., [1904] 1 Ch. 558, affirmed that: "(…) an action cannot be brought by an individual shareholder complaining of an act which is *ultra vires* if he himself has in his pocket at the time he brings the action some of the proceeds of that very *ultra vires* act. Nor, in my opinion, does it alter matters that he represents himself as suing on behalf of himself and other (...)".

[108]Nurcombe v. Nurcombe. The Court of Appeal affirmed that: "(…) in my judgment, (Towers) establishes that behaviour by the minority shareholder, which, in the eyes of equity, would render it unjust to allow a claim brought by the company at his instance to succeed, provides a defence to a minority shareholder's action. In practice, this means that equitable defences which would have been open to defendants in an action brought by the minority shareholder personally (if the cause of action had been vested in him) would also provide a defence to those defendants in a minority shareholder's action

From these cases we can understand that there are ways to allow the clean hands doctrine to enter derivative actions. Through the recommendation the courts must take into consideration "(…) all relevant circumstances without limit (…)".[109] Also in determining the consent of derivative actions to proceed and through the *ad hoc* recommendation the court takes into consideration the good faith of the actor.[110]

There is no relevant definition for the good ending given that it is believed that: "(...) generally readily recognizable (...)" can be understood from the courts' own interpretation (Abi-Saab, Keith, Marleau, Marquet, 2019).[111]

Courts have, thus, traditionally adopted a relatively conduct-based approach to clarify whether shareholders should be affected personally and/or punish only those shareholders who

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brought by him (…)".

[109]Law Com. No. 246, Shareholders Remedies, para. 6.73-6.74.

[110] Law Com. No. 246, Shareholders Remedies, par. 6.75-6.76. The Report, therefore, has not indicated the *bona fide* as a prerequisite.

[111]The Law Commission's has take in consideration the "interests of the company" (n. 44). In particular, in the Nurcombe case the court affirms that: "(…) (the plaintiff) is in effect saying: although I have shared with the first defendant his ill- gotten gains, I want the court to order that he should pay over to (the company) his share of them plus my share so that I can have a chance of getting some more because of my status as a shareholder (…)".

are considered responsible for wrongdoing (Burrows, 2013).[112]
This statement hides the fact that the relevant circumstances indicate that the company is small in size and so it is understood that the clean hands doctrine offers in a practical way a tool to prevent people, who are not involved in wrongdoing from being punished.
The defendant takes the path of defense where his lawyer highlights that the clean hands doctrine works every time: "(...) the plaintiff has behaved incorrectly towards him in relation to the issue submitted to trial (…). It will then have to convince the court that one of the three values underlying the doctrine - integrity of jurisdiction, justice and public interest - obliges the court to apply it (...)" (Burrows, 2013).

The estoppel principle

According to Lord Denning the estoppel is: "(…) a principle of justice and equity. It comes to this: when a man, by his words or conduct of him, has led another to believe in a particular state of affairs, he will not be allowed to go back on it when it would be unjust or inequitable for him to do I know".[113]

[112]Bairstow v. Queens Moat Houses plc (CA), [2001] EWCA Civ. 712 2 B.C.L.C. 531.
[113]Moorgate Mercantile Co. Ltd. v. Twitchings (1976), 1 QB 225, CA, p.

Estoppel as a principle (Macgibbon, 1958; Martin, 1979): "(…) operates on the assumption that one party has been induced to act in reliance on the assurances of other conduct of another party, in such a way that it would be prejudiced were the other party late to change its position (…)" (Mosler, 1974).

Under some conditions (Kolb, 2006) it is the law itself that binds a party to the expectation that it has created. Therefore, the estoppel has been characterized as: "(...) simple and wholly untechnical conception, perhaps the most powerful and flexible instrument to be found in any system of court jurisprudence (…)".[114]

This principle is part of the Anglo-American common law[115] and of the general concept of good faith and "preclusion" and/or "foreclosure" of continental tradition (Cottier, Müller, 2007).

International estoppel is different from its civil and common law

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[114]Canada and Dominion Sugar Company Ltd. v. Canadian National (West Indies) Steamships Ltd., (1946) AC 46, PC, p. 55.

[115]White v. Ashton, 51 N. Y. 280, 287, Horn v. Cole, 51 N.H. 287, is affirmed that: "(…) appears that what has sometimes been called an equitable estoppel, and sometimes with less propriety an estoppel in *pais*, is properly and peculiarly a doctrine of equity, originally introduced there to prevent a party from taking a dishonest and unconscientious advantage of his strict legal rights, though now with us, like many other doctrines of equity, habitually administered at law (…)".

ancestors (Macgibbon, 1958). The international estoppel has broader lines (Wagner, 1986).

According to MacGibbon the estoppel: "(...) has been invoked (…) upon an insistence on good faith and equitable conduct coupled with a lively awareness of the danger of adopting inconsistent attitudes at different times (…).

A modern opinion is tending to elevate the concept of estoppel to the rank of one of the "general principles of law recognized by civilized Nations (…)" (Jenks, 1964). Estoppel and *bona fide* allows it to take on a greater dimension (Bowett, 1957). Acting in good faith it is a general principle of law and is part of the sources of international law, which highlights Article 38 of the Statute of the ICJ (Paparinskis, 2013).[116] Therefore, as a general principle of law it is also applied to the decisions of the ICJ (Traviss, 2012).[117]

The principle of estoppel can function at a substantive level as well as finds space at the procedural level and can be conceived supplementarily to the creation, modification and extinction of

[116]ICJ, Certain Norwegian Loans (France v. Norway), 6 July 1957, I.C.J. Rep. 1957 (dissenting opinion of judge Lauterpacht).

[117]ICJ, Fisheries case (U.K. v. Norway), 18 December 1951, I.C.J. Rep, 116, 1951. Temple of Preah Vihear, (Cambodia v. Thailand), op. cit., Nuclear Tests (New Zealand v. France), 20 December 1974, I.C.J. Rep. 1974. Delimitation of the Maritime Boundary in the Gulf of Maine Area, op. cit.

subjective rights as a source of obligation.[118] The form of estoppel is also applied outside of judicial proceedings. It is based on a legitimate expectation and on certain facts which cannot be *proven contra factum* to judicial proceedings. It also concerns issues related to evidence (Martin, 1979).

Within this context, we recall the words of judge Spencer in the Temple of Preah Vihear case who specified estoppel as a: "(…) principle that operates to prevent a state contesting before the court (...) a situation contrary to a clear and unequivocal representation previously made by it to another state, either expressly or impliedly, on which representation of the other state was, under certain circumstances, entitled to rely and in fact did rely, and as a result that other state has been prejudiced or the state making it has secured some benefit or advantage for itself (…)" (Ciorciari, 2014).[119].

The principle of estoppel exists under requirements that are precluded (estopped) from adopting decisions and/or behaviors that are contrary to the same object. This concept is distinct from broad notions of estoppel such as *non licet* and *contra factum proprio* or *allegans contrari non audiendus est* (Cottier, Müller, 2007). This difference is part of the fact that any damage and

[118]ICJ, Temple of Preah Vihear (Cambodia v. Thailand), op. cit., para. 32.

[119]ICJ, Temple of Preah Vihear, (Cambodia v. Thailand), op. cit., and especially the dissenting opinion of Sir Percy Spender.

prejudice is required in light of the maxims that are part of civil law.

Estoppel prevails in public international law developing the law especially after the Second World War (Dominicè, 1968; Martin, 1979; Kolb, 2000) even before the appearance of decisions of this kind.[120]

The ICJ addresses the question of the estoppel, where in the North Sea Continental Shelf case it took a restrictive notion stating that: "(…) only a very defined, very consistent course of conduct" can have a binding effect on a third party[121] (…) appears to the court (...)".

Only the existence of a situation of estoppel could suffice to lend substance to the contention that the Federal Republic was bound by the Geneva Convention on the Continental Shelf-that, i.e. if the Federal Republic precluded from denying the applicability of the conventional regime, by reason of past conduct, declarations,

[120]Tinoco Claims Arbitration (Great Britain v. Costa Rica), 1923, 1 RIAA para. 369, 383-384. Payment in Gold of Brazilian Federal Loans Issued in France (France v. Brazil), PCIJ Rep Series A No 21. Payment of Various Serbian Loans Issued in France (France v. Kingdom of the Serbs, Croats and Slovenes), PCIJ Rep Series A No 20/21.

[121]PCIJ, Payment of Various Serbian Loans Issued in France (France v. Kingdom of the Serbs, Croats and Slovenes), PCIJ Rep Series A No 20/21, par. 28.

etc., which not only clearly and consistently evinced acceptance of that regime, but also had caused Denmark or the Netherlands, in reliance on such conduct, detrimentally to change position or suffer some prejudice (Magnùsson, 2015; Mossop, 2016).[122]

The ICJ adopted a restrictive concept of estoppel in 1984 as we saw in the Gulf of Maine case[123] stating that: "(...) the requirement of prejudice or damage which distinguishes estoppel in the strict sense from acquiescence (...) recognizing the delimitation based on the median line, it was, in that context, considered insufficient to legitimize the effective invocation of estoppel (…)" (Liakopoulos, 2022).[124]

Continuing with the Land and Maritime Boundary between Cameroon and Nigeria, it was declared that: "(...) an estoppel would only arise by its acts or declarations. Cameroon had consistently made it fully clear that it had agreed to settle the boundary dispute submitted to the court by bilateral avenues alone. It would further be necessary that, by relying on such an attitude, Nigeria had changed position to its own detriment or had

[122]ICJ, North Sea Continental Shelf (Denmark v. Federal Republic of Germany) order of 8 March 1967, ICJ Reports 1967, p. 3.

[123]ICJ, Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v. U.S.A.), 12 October 1984, I.C.J. Rep 1984.

[124]ICJ, Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v. U.S.A.), op. cit., para. 126-154, para. 142–45.

suffered some prejudice (…)" (Venzke, 2011).[125]

From the first declarations of the jurisprudence of the ICJ we understood that the principle of estoppel has a restrictive character and the controversies tend to base the defenses on a broader notion, which is confused with the acquiescence and with the perception of the *contra factum proprio,* so as to increase the effects of the same principle in an important way.

The estoppel is part of arbitrations[126] and present in dissenting opinions of judges.[127] Obviously there is no agreement on the qualification of sources and for some it is part of the concept of *bona fide* (Kolb, 2017). The ICJ itself has already stated that: "(...) estoppel follow(s) (...) the fundamental principles of good faith and equity (…)" (Lis, 2016).[128]

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[125]ICJ, Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea Intervening), 11 June 1998, ICJ Rep. 1998, para. 57; Aerial Incident of 10 August 1999 (Pakistan v. India), 21 June 2000, I.C.J. Rep. 2010, para. 45. Legality of Use of Force (Serbia and Montenegro v. Canada), 2004, ICJ Rep 429, para. 42.

[126]Oil Field of Texas, Inc v. the Government of the Islamic Republic of Iran et al, Concurring Opinion di Richard M Mosk, 1 Iran-US CTR para. 363 and 375-376.

[127]ICJ, Gabčíkovo-Nagymaros Project (Hungary v. Slovakia), 25 September 1997, I.C.J. Rep. 1997, separate opinion of Vice-President Weeramantry, para. 115-118.

[128]IICJ, Delimitation of the Maritime Boundary in the Gulf of Maine Area

The estoppel and the doctrine of the clean hands are overlapping. For the doctrine of the clean hands, illicit or immoral conduct in a dispute is related to the *petitum,* however*,* for estoppel it is not part of the illegality or immorality of the declarations and behaviors adopted. The clean hands doctrine has as its basis its application which is not part of the estoppel, thus declining the elastic terms that governs the rules of positive law.

Unjustified enrichment

The unjustified enrichment is explained by Art. 38, par. 1 of the Statute of the ICJ, according to the dissenting opinion of judge Spiropoulos in the arbitrator case of Ambatielos of 6 March 1956,[129] the Libyan American Oil Company (hereinafter, LIAMCO) award of 12 April 1977,[130] and the Iran-US Claims Tribunal case (Helgeson, Lauterpacht, 2000).[131]

(Canada v. U.S.A.), op. cit., para. 130.

[129]Ambatielos [dissenting opinion of judge Spiropoulos] [1956] 12 RIAA, para. 8, 1239.

[130]LIAMCO v. Government of the Libyan Arab Republic [12 April 1977] 62 ILR, para. 141, 175–176, para. 141, 175-176.

[131]Sea-Land 6 Iran-US Claims Tribunal Reports [Grotius Cambridge 1986], para. 149, 168. Shannon & Wilson, Inc. v. AEOI 9 Iran-US Claims Tribunal Reports (Grotius Cambridge 1987), para. 397, 402. Flexi-Van Leasing, Inc. v. Iran 12 Iran-US Claims Tribunal Reports (Grotius Cambridge 1988), para.

Already in the ICSID and UNCITRAL arbitrations the principle of unjust enrichment was "baptized" as a general principle of law. In fact, this principle is a reality in the Saluka Investments BV [The Netherlands] v. Czech Republic[132] and in the Inceysa Vallisoletana SL v. Republic of El Salvador[133] cases. Such a prinicple remains the same in the context of the European Union law given that according to the Court of Justice of the European Union this is also a "general principle of Community law".[134]

In the Iran-U.S. case the Claims Tribunal stated in this regard: "(…) there must have been an enrichment of one party to the detriment of the other, and both must arise as a consequence of the same act or event. There must be no justification for the enrichment, and no contractual or other remedy available to the injured party whereby he might seek compensation from the party enriched (…)".[135]

335, 353. Schlegel Corp v. NICIC 14 Iran-US Claim Tribunal Reports (Grotius Cambridge 1988), para. 176, 180]. Isaiah v. Bank Mellat 2 Iran-US Claims Tribunal Reports [Grotius Cambridge 1984], para. 232, 237.

[132]Saluka Investments bv (The Netherlands) v. Czech Republic, UNCITRAL, Partial Award, 17 March 2006, para. 449.

[133]Inceysa Vallisoletana SL v. Republic of El Salvador [Award of 2 August 2006] ICSID Case No ARB/03/26, para. 253–254.

[134]CJEU, C-259/87, Hellenic Republic v. Commission of the European Communities of 10 July 1990, ECR I-02845, para. 2.

[135]Iran-United States Claims Tribunal Reports (Grotius Cambridge 1983-

Through an analysis of comparative law we can understand that the general principle includes unjustified enrichment in Roman law, in the Corpus Iuris Civilis and in national legal systems. The latter have developed remedies when faced with similar situations. As is obvious, this principle also finds its basis in the principle of equity as we understood from the dissenting opinions of the judges during the arbitrators.[136] Many times the defendants also speak of alleged unjust enrichment as a type of defense to reduce the relevant amount of compensation awarded.[137]

Illegality in the common and civil law system is used as a type of

1996) vol. 1-28.

[136]Ambatielos [Dissenting Opinion of judge Spiropoulos], op. cit., Chas T. Main v. Mahab [Concurring Opinion of judge Mosk] 3 Iran-US Claims Tribunal Reports [Grotius Cambridge 1984] para. 270, 279. Shannon & Wilson, Inc. v. AEOI 9 Iran-US Claims Tribunal Reports [Grotius Cambridge 1987] para. 397, 402.

[137]CMS Gas Transmission Company v. the Republic of Argentina, ICSID Case No ARB/01/8, 12 May 2005, para. 218-220; LG&E v. Argentina, ICSID Case No ARB/02/1, 25 July 2007, para. 26, 58. American Manufacturing & Trading, Inc. v. Zaire ("AMT v. Zaire"), ICSID Case No ARB/93/1, 21 February 1997. Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt ICSID Case No ARB/84/3, 20 May 1992, para. 245-247 and Zeevi Holdings v. Bulgaria and the Privatization Agency of Bulgaria [Final Award of 25 October 2006] UNCITRAL Arbitration Case UNC 39/DK.

defense to address an unjust enrichment claim as we see in International Chamber of Commerce Award No 2930 (1982) IX YBCA 105, 107 et seq which stated: "(…) illegality implies that the plaintiff's own illegal or immoral conduct can defeat a claim in unjust enrichment which would otherwise lie (...). There is, interestingly, no divide between common law and civil law as regards the illegality defence. This has largely to do with the fact that this defence can be traced back to Roman law in all legal systems under consideration (…)" (Dannemann, 2002).

Especially, through arbitration jurisprudence corruption among the courts was declared. The parties demand the execution of the contract and ask for restitution under it.

The principle of *nemo auditur propriom turpitudinem suam allegans* outlines the declination from jurisdiction denying, however, the remedy that restores tainted contracts dealing with corruption and fraud.[138]

Within this context, complaints about contaminated contracts that have used illegal practices are also rejected for jurisdictional

[138]International Chamber of Commerce Award No 1110 [1963] XXI YBCA 47. International Chamber of Commerce Award No 3913 [1981] 111 Clunet 920. International Chamber of Commerce Award No 6497 [1994] XXIV YBCA 71. World Duty Free Company Ltd. v. Republic of Kenya, ICSID Case No. ARB/00/7, 4 October 2006, para. 179-187.

reasons and with reference to the principle of *nemo auditur.*[139] So corruption contaminates illicit conduct and claims unjust enrichment as a percentage that can happen. The only exception is in the case of fraud or corruption that influences the conclusion and execution of the final contract.[140] If this were not the case, we can understand that the certainty of the principle *nemo auditur propriom turpitudinem suam allegans* is part of international usage and practice, that is also applied to unjustified enrichment (Binder, Schreuer, 2017).

Direct and indirect interstate disputes

From what we have understood so far is that the doctrine of the clean hands is quite synthetic despite the fact that the help of jurisprudence considers it as a doctrine that is part of contemporary general international law (Rousseau, 1983; Simma, 1999; Laplante, 2007).[141] The ILC itself has taken a position, in

[139]Inceysa Vallisoletana SL v. Republic of El Salvador [Award of 2 August 2006] ICSID Case No ARB/03/26 para. 338-339. Plama Consortium Limited v. Republic of Bulgaria, ICSID Case No. ARB/03/24, 27 August 2008, para. 568–590.

[140]Société d'Investigation de Recherche et d'Exploitation Minière [SIREXM] v. Burkina Faso, ICSID Case No ARB/97/1, 19 January 2000.

[141]Diplomatic Protection, 56th sess, (2004) 1 Yearbook of the International

this regard, affirming that: "(…) the importance of the clean hands doctrine in international law could not be denied (…)" (Lowe, 1989; Shapovalov, 2005).[142]

In our opinion, the general procedural law principle of cleans hands is applicable in international jurisdictional proceedings and has the objective of resolving disputes verifying whether practice confirms the existence of such a theoretical approach. The clean hands doctrine as a principle of equity in the context of public international law excludes the possibility of calling for international responsibility for the state committed an offense as a response to conduct that violates the rules governing the same situation. This doctrine is thus considered with various nuances

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Law Commission 4, para. 35 (Brownlie), UN Doc. A/CN.4/SER.A/2004. State Responsibility, 52nd sess., (2000) 1 Yearbook of the International Law Commission 218, para. 17 (Crawford), UN Doc A/CN.4/SER.A/2000; State Responsibility, 51st sess, (1999) 2 Yearbook of the International Law Commission 85, paras 411-415, UN Doc. A/CN.4/SER.A/1999/Add.1 (Pt 2). According to Rousseau: ("(…) il n'est pas possible de considérer la théorie des mains propres comme une institution du droit coutumier géneral (...)").

[142]Report of the International Law Commission, 57th sess., 2005, UN Doc A/60/10, 110 (Special Rapporteur on Diplomatic Protection, John Dugard). State Responsibility, 51st sess (n 59) 85, op. cit., para. 413ss. 2. According to Pellet "(…) the clean hands doctrine has not autonomous consequences (…)". See the Diplomatic Protection, 56th session (n 59) 12, par. 5.

in direct and indirect interstate disputes (Liakopoulos, 2020b).

In interstate disputes the clean hands doctrine appears in the pleadings of the respondent states, in the proceedings before the ICJ, in the dissenting opinions from the participating judges and in decisions that are annexed to the relevant judgments. The ICJ has not entered into explicit terms in the relevant doctrine and has not taken a position to exclude this notion from the general principles of international law (Gordon, 2009).[143]

The ICJ has expressed itself positively on this doctrine and in disputes between states where the ICJ has included it as a doctrine in the relevant articles on diplomatic protection.[144] Of course, there is no shortage of preliminary exceptions to exclude the admissibility of the requests as a procedural principle that the ICJ considered during the merits phase.[145]

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[143]ICJ, Legal consequences of the construction of a wall in the occupied Palestinian territory, 9 July 2004, in ICJ. Report, 2004, para. 63-64: "(…) it was the General Assembly which requested the advisory opinion, and the opinion is to the General Assembly, and not to a specific state (...)" and the case: Oil Platforms (Islamic Republic of Iran v. United States of America), 6 November 2003, I.C.J. Rep., 2003, para. 29-30.

[144]Diplomatic Protection, Report of International Law Commission, International Law 57th Session, UN Doc. A/60/10.

[145]ICJ, Oil Platforms, (Islamic Republic of Iran v. United States of America), op. cit., para. 29.

Direct interstate disputes and clean hands doctrine

The invoking of clean hands doctrine to international jurisdictions has opened the way for a quite interesting line of interpretation. We remember the words of Sir Gerald Fitzmaurice where already in 1967 and 1973 as a judge in the ICJ stated that: "(…) comes into equity for relief must come with clean hands (…) thus a state which is guilty of illegal conduct may be deprived of the necessary *locus standi in judicio* for complaining of corresponding illegalities on the part of the other states, especially if these were consequential on or embarked upon in order to counter its own illegalities-in short were provoked by it (…)" (Fitzmaurice, 1957).

The Permanent Court of International Justice (PCIJ) stated that the doctrine of clean hands was called in direct interstate disputes and in the written and oral briefs of the defendant states (Amerasinghe, 2008).[146]

Judge Anzilotti way back in 1933 in the case relating to the legal status of eastern Greenland stated that: "(...) an unlawful act cannot serve as the basis of an action at law (...)[147] which the

[146]"(…) the doctrine has most frequently been raised in the context of inter-state relations where states (or dissenting judges) have sought to have a claim declared inadmissible or dismissed for the reason, apparently, if not explicitly, that the applicant state's hands are unclean (…)".

[147]PCIJ, Legal Status of Eastern Greenland (Denmark v. Norway), op. cit., p.

state (...) has never adhered to in explicit terms (…) it has never even gone so far as to deny its inclusion among the general principles of international law (…)".

(Follows). PCIJ and the clean hands doctrine

Speaking of clean hands doctrine in the PCIJ, one immediately recalls the Factory at Chorzòw[148] case, where it was stated that: "(...) Poland should have provided insurance to two German companies (Oberschlesische Stickstoffwerke A.-G. and Bayerische Stickstoffwerke A.-G.) due to the attitude adopted by the Polish government towards them when it expropriated the nitrate factory in Chorzòw (…)".

In sentence no. 7 of 25 May 1926 did not comply with the provisions of Articles 6 et seq. of the Convention on Upper Silesia concluded in Geneva on 15 May 1922 between Germany and Poland and by virtue of which Germany had agreed to transfer control of the region of Upper Silesia to Poland, with the agreement that the latter would not expropriate any German property. A fundamental procedural principle, according to the Court, reiterated by the Geneva Convention itself, is that no

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[148]PCIJ, Factory at Chorzòw case, (Federal Republic of Germany v. Poland), op. cit., par. 31.

expropriation can be carried out without notice, excluding, thus, the opportunity for the owner to be heard before the competent court.

In this case, Poland had not allowed the correct procedure to be carried out and the expropriation of the companies involved had taken place, therefore, in violation of the Geneva Convention. The Polish government could not expect, as it did, that the interested parties presented for compensation for the damage suffered before the internal courts because, by proceeding in this way, the interested parties would have been able to obtain at most the repair of the error, while, if the procedure had been strictly followed, the damage would probably never have occurred concluded in the sense that "(…) it is a principle generally accepted in the jurisprudence of international arbitration, as well as by municipal courts, that one party cannot avail himself of the fact that the other has not fulfilled some obligation or has not had recourse to some means of redress if the former party has, by some illegal act, prevented the latter from fulfilling the obligation in question (…)" (Liakopoulos., 2020a).[149]

This is the only case where the clean hands doctrine was expressed in favor of the plaintiff. The scope of development in

[149]ICJ, Interpretation of Peace Treaties Case (1950) by judge Read, ICJ Reports (1950), pp. 221, 244.

subsequent jurisprudential practice is realized by the defendant, who tried to block the plaintiff's requests.

The invocation and application of this doctrine was also found in the Diversion of the Waters of the Meuse (Netherlands v. Belgium)[150] case and in the opinions expressed by judges Hudson and Anzilotti, where it was stated that: "(...) The Netherlands accused Belgium of altering the water level of the Meuse River following the construction of a canal system in violation of the terms of the treaty. Belgium, in replying to the Dutch accusations, argued that the Netherlands could not judicially invoke that same bilateral treaty against Belgium as they had previously created, in turn, a system of locks which was also in violation of the contractually established terms (...) the Netherlands had themselves previously engaged in illicit conduct in relation to the same treaty (…)".

It cannot refrain from comparing the case of the Belgian lock with that of the Netherlands lock at Bosscheveld. Neither of these locks constitutes a feeder, yet both of them discharge their lock-water into the canal, and thus take part in feeding it with water otherwise than through the treaty feeder, though without producing an excessive current in the Zuid-Willemsvaart. In

[150]PCIJ, Case Concerning the Diversion of Water from the River Meuse, (Netherlands v. Belgium), op. cit.

these circumstances, the court finds it difficult to admit that the Netherlands are now warranted in complaining of the construction and operation of a lock of which they themselves set an example in the past (…)".[151]

In particular, the Court rejected the Dutch positions which were based on the principle of *inadimplenti non est adimplendum*, noted in the Factory at Chorzòw case. The principle of equity is noted according to the dissenting opinion of judge Hudson: "(…) a party is excluded from the possibility of invoking and obtaining a favorable ruling where its conduct is tainted by "unclean hands" (…) the court is asked to decree a kind of specific performance of a reciprocal obligation which the demandant is not performing". It must clearly refuse to do so.[152] It would seem important the principle of equity. In fact, the two parties have assumed an identical or a reciprocal obligation, one party which is engaged in continuing non-performance of that obligation should not be permitted to take advantage of a similar non-performance of that obligation by the other party.

The principle finds expression in the so-called maxims of equity,

[151]PCIJ, Case Concerning the Diversion of Water from the River Meuse, (Netherlands v. Belgium), op. cit., par. 84.

[152]PCIJ, Case Concerning the Diversion of Water from the River Meuse, (Netherlands v. Belgium), op. cit., dissenting opinion of judge Hudson, pp. 77-78.

which exercised great influence in the creative period of development of the Anglo-American law. A court of equity refuses relief to a plaintiff whose conduct in regard to the subject-matter of the litigation has been improper. A very similar principle was received into Roman Law.

The exception *non adimpleti contractus* required a claimant to prove that he had performed his obligation.[153] A court of equity refuses relief to a plaintiff whose conduct in regard to the subject matter of the litigation has been improper, and with scrupulous regard the limitations which are necessary. A tribunal bound by international law ought not to shrink from applying a principle of such obvious fairness.[154]

The principle of equity has been expressed as an integral part of international law. The court, in this regard, affirmed: "(…) it has the opportunity to use these principles for the purpose of making

[153]PCIJ, Case Concerning the Diversion of Water from the River Meuse, (Netherlands v. Belgium), op. cit., and the individual opinion of judge Hudson, para. 77.

[154]PCIJ, Case Concerning the Diversion of Water from the River Meuse, (Netherlands v. Belgium), op. cit., dissenting opinion of judge Anzilloti, para. 49 based on the principle of *inadimplenti non est adimplendum* affirmed that: "(…) it is one of these "general principles of law recognized by civilized nations" which the court applies in virtue of Article 38 of its Statute (…)".

its own decision based on Art. 38 of its Statute (…) (Jenks, 1964).[155] In the same controversy judge Anzilotti took into consideration the principle of *inadimplenti non est adimplendum* stating that: "(...) is so just, so equitable, so universally recognized", to the point of finding application also in context of international relations and believed that, in any case, it integrated one of those general principles of law recognized by civilized nations which the court applies by virtue of Article 38 of its Statute (…)".[156]

As can be understood from the opinions of judges Hudson and Anzilotti the doctrine of clean hands is part of general international law like those common principles that are developed in the legal systems of common and civil law, constituting sources according to Art. 38 of the Statute of the ICJ.

[155]"(…) judge Hudson's view that this principle was applicable was shared by the majority of the Court and by judge Anzilotti (...)".

[156]PCIJ, Case Concerning the Diversion of Water from the River Meuse, (Netherlands v. Belgium), op. cit., dissenting opinion of judge Anzilotti, para. 49.

The jurisprudence of the ICJ and the clean hands doctrine

The jurisprudential panorama of the ICJ is too long. Speaking for the doctrine of clean hands we immediately recall the dissenting opinion of judge Schwebel in the case relating to military and paramilitary activities in and against Nicaragua. This is a particular position where the clean hands doctrine has not theorized to deny the existence of the general principle of international law despite having had the opportunity to pronounce in this sense, thus paying attention to various doctrinal discussions (Gordon, 2009).[157]

The dissenting opinions of judges Morozov and Tarazi in the United States Diplomatic and Consular Staff in Tehran case (Zoller, 1980)[158] have also to do with the doctrine of clean hands. In particular, judge Morozov stated: "(…) about to decide on the

[157]ICJ, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, op. cit., para. 63-64 affirmed that: "(…) it was the General Assembly which requested the advisory opinion, and the opinion is to the General Assembly, and not to a specific state (…)", op. cit., para. 29-30.

[158]ICJ, United States Diplomatic and Consular Staff in Teheran (United States of America v. Iran), Provisional Measures, Order, 15 December 1979, I.C.J. Rep. 1979, pp. 53-55, 62-63.

merits of the case, the United States undertook a (failed) military operation to rescue its personnel detained in Iran, invoking as justifications the humanitarian well-being of its citizens and its right of self-defense under the Charter of the United Nations (...) Iran, in a brief addressed to the ICJ, argued that the United States was involved in "continuous interference (...) in the internal affairs of Iran, the shameless exploitation of our country, and numerous crimes perpetrated against the Iranian people" (…) the incursion can have no bearing on the evaluation of the conduct of the Iranian Government over six months earlier (...) which is the subject-matter of the United States "application" (…) the alleged illicit US interventions could not have justified Iran's illegalities to the detriment of the diplomatic and consular rights of the United States, since the Convention provided remedies to address the problems denounced by Iran and Iran had chosen not to use them (…) questions relating to the lawfulness of the operation and the potential consequences of an unlawful act had not been raised before the court (…) the court rejected the idea that the liability of Iran could have been excluded due to the United States' acceptance of the Shah on its territory and its refusal to extradite him (…).[159]

[159]ICJ, United States Diplomatic and Consular Staff in Teheran (United States of America v. Iran), Provisional Measures, Order, op. cit., para. 10, 32-33, 87, 88-89.

Judge Tarazi followed a different line of thought by stating that: "(...) Iran's accusations did not make its violations less (...) Iranian accusations of US intervention in Iran's internal affairs - presumably illegal according to Iranian law-were founded (…) should be placed in the balance when the responsibility incurred by the Iranian government falls to be weighed (…) the United States were in error regarding the disturbances directed against him since he had granted the entry to the Shah in full knowledge of its potential repercussions - thus constituting a further element to be considered in the evaluation of Iranian responsibility (…)".[160]

It is clear from the opinion of judge Morozov that part of the trial was concluded illicitly in relation to the subject matter of the dispute given that one was prevented from asserting one's right and above all because the military measures of an economic nature envisaged by the United States had as their objective: "(...) [w]hile declaring its intention to settle the dispute between the United States of America and the Islamic Republic of Iran exclusively by peaceful means, and presenting its application to the court, the applicant in fact simultaneously acted contrary to its own declaration, and committed a series of grave violations of

[160]ICJ, United States Diplomatic and Consular Staff in Teheran (United States of America v. Iran), Provisional Measures, Order, op. cit., para. 61, 62-63.

the provisions of general international law and the Charter of the United Nations (…)".[161]

It was an enormous damage what the United States had caused to Iran. It forfeited the legal right as well as the moral right to expect the court to uphold any claim for reparation (pars. 53 and 54-55). A situation in which the court has carried on its judicial deliberations in the current case.

This has no precedent in the whole history of the administration of international justice either before this court, or before any international judicial institution (parr. 54-55).

The balance between illicit conduct placed in the opposing parties is inspired by the ratio of making a decision based on the principle of equity.

(Follows). Military and paramilitary activities in and against Nicaragua (Nicaragua v. United States of America)

Recalling the case of military and paramilitary activities against Nicaragua, the use of armed force as a violation of customary international law was based on Art. 2, par. 4 of the UN Charter (Pellet, 2014) suggesting that the ICJ condemned the UN to immediately cease the relevant conduct and refrained from acts

[161]ICJ, United States Diplomatic and Consular Staff in Teheran (United States of America v. Iran), Provisional Measures, Order, op. cit., par. 89.

that constituted violations of the obligations established by customary international law in the Treaty of Friendship on Commerce and Navigation of 1956.[162]

The dissenting opinion of judge Schwebel was focused on the doctrine of clean hands doctrine to support compliance with the decision taken by the court itself.[163] In fact, Schwebel through his dissenting opinion[164] stated that: "(…) Nicaragua had presented itself before the court with unclean hands, given its previous illicit acts committed against neighboring states, especially against El Salvador (…) Nicaragua has not come to the court with clean hands. On the contrary, as the aggressor, indirectly responsible-but ultimately responsible-for large numbers of deaths and widespread destruction in El Salvador apparently much exceeding that which Nicaragua has sustained, Nicaragua's hands are odiously unclean (...)[165] as against Nicaragua (…) a

[162]ICJ, Case concerning Military and Paramilitary Activities in and Against Nicaragua, (Nicaragua v. United States of America), op. cit.

[163]ICJ, Case Concerning Military and Paramilitary Activities in and Against Nicaragua, (Nicaragua v. United States of America), op. cit., dissenting opinion of judge Schwebel, par. 266ss.

[164]ICJ, Case Concerning Military and Paramilitary Activities in and Against Nicaragua, (Nicaragua v. United States of America), op. cit., para.154-161.

[165]ICJ, Case Concerning Military and Paramilitary Activities in and Against Nicaragua, (Nicaragua v. United States of America), op. cit., dissenting opinion of judge Schwebel, I.C.J. Reports 1986, para. 268.

further factor comes into play, in addition to those specified above. Nicaragua stands in violation of that most pertinent obligation which the court set forth in the Corfu Channel case, namely its obligation not to knowingly allow its territory to be used for acts contrary to the rights of other states (…) since Nicaragua has violated and continues to violate that cardinal obligation years before the mining and maintained that violation during the period of the mining and thereafter, Nicaragua cannot be heard to complain, as against it, of the mining of its ports (…)".[166]

The clean hands doctrine is a defense capable of excluding the state author of the offense from the necessary *locus standi injudicio* "for complaining of corresponding illegalities on the part of other states", especially if these were consequential on or were embarked upon in order to counter its own illegality-in short were provoked by it.[167]

Nicaragua had falsely represented to the court the facts of the case in what had been the witness statements made by its

[166]ICJ, Case Concerning Military and Paramilitary Activities in and Against Nicaragua, (Nicaragua v. United States of America), op. cit., dissenting opinion of judge Schwebel, op. cit., para. 380-81, 392-394.

[167]ICJ, Case Concerning Military and Paramilitary Activities in and Against Nicaragua, (Nicaragua v. United States of America), op. cit., dissenting opinion of judge Schwebel, op. cit., par. 271.

ministers[168] both on the grounds of its unlawful armed intervention in El Salvador and its deliberate seeking to mislead the court about the facts of that intervention trough false testimony of its ministers, Nicaragua's claims against the United States should fail[169] regardless of the consideration of the proportionality and necessity of the US action.[170]

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[168]ICJ, Case Concerning Military and Paramilitary Activities in and Against Nicaragua, (Nicaragua v. United States of America), op. cit., dissenting opinion of judge Schwebel, op. cit., para. 27, "(…) the foundation of judicial decision is the establishment of the truth. Deliberate misrepresentations by the representatives of a government party to a case before this court cannot be accepted because they undermine the essence of the judicial function. This is particularly true where, as here, such misrepresentations are of facts that arguably are essential, and incontestably are material, to the court's judgment (...)".

[169]ICJ, Case Concerning Military and Paramilitary Activities in and Against Nicaragua, (Nicaragua v. United States of America), op. cit., dissenting opinion of judge Schwebel, op. cit., par. 268.

[170]ICJ, Case Concerning Military and Paramilitary Activities in and Against Nicaragua, (Nicaragua v. United States of America), dissenting opinion of judge Schwebel, op. cit.: "(…) the state which first intervened with the use of force in the affairs of another state in the dispute before the court was Nicaragua (…) Nicaragua has compounded its delictual behaviour by pressing false testimony on the court in a deliberate effort to conceal it. Accordingly, on both grounds, Nicaragua does not come before the court with clean hands. Judgement in its favour is thus unwarranted, and would

In fact, the dissenting opinion of judge Schwebel was based on the case relating to the Diversion of the waters of the Meuse river in which it was stated that: "(...) a variation of the clean hands doctrine"[171] which found its foundation "in a famous statement which have never been objected to (…) the principle (*inadimplenti non est adimplendum*) is so just so equitable, so universally recognized that it must be applied in international relations (...)".

Schwebel also took into consideration the dissenting opinion of judge Hudson who stated: "similar principle was received into Roman law "*the exceptio inadimplenti non adimpleti contractus*"" noting how this "is the basis of articles of the German Civil Code", and is indeed a general principle of law.

The idea that Belgium could not be forced to divest a certain activity while allowing, at the same time, the Netherlands to continue to conduct a similar activity because the court is asked to decree a kind of specific performance of a reciprocal

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be unwarranted even if it should be concluded-and should not be-that the responsive actions of the United States were unnecessary or disproportionate (…)".

[171]ICJ, Case Concerning Military and Paramilitary Activities in and Against Nicaragua, (Nicaragua v. United States of America), dissenting opinion of judge Schwebel, op. cit., par. 269.

obligation which the demandant is not performing,[172] in the case in question the Court could not "decree a kind of specific performance of a reciprocal obligation which (Nicaragua) is not performing".[173]

The clean hands doctrine also found direct support in the Mavrommatis case in which the court expressed itself in the following terms: "M. Mavrommatis was bound to perform the acts which he actually did perform in order to preserve his contracts from lapsing as they would otherwise have done (…)".[174]

The principle of clean hands also found its basis in the words of judge Anzilotti regarding the legal status of Eastern Greenland stating that: "(…) an unlawful act cannot serve as the basis of an action at law"[175] and in the Factory at Chorzòw case where the court, similarly, held that "(...) a party cannot avail itself of the fact that the other has not fulfilled some obligation (...) if the former party has, by some illegal act, prevented the latter from fulfilling the obligation in question (…)".[176]

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[172]Dissenting opinion of judge Hudson, op. cit., pp. 77-78.

[173]Dissenting opinion of judge Schwebel, op. cit., para. 269.

[174]Dissenting opinion of judge Schwebel, op. cit., par. 270.

[175]CPIJ, Legal Status of Eastern Greenland, (Denmark v. Norway), op. cit., para. 308.

[176]PCIJ, Factory at Chorzòw case (Federal Republic of Germany v. Poland),

The statements just cited make us think of the words of Sir Gerald Fitzmaurice, who maintained that: "(…) he who comes to equity for relief must come with "clean hands". Thus, a state which is guilty of illegal conduct may be deprived of the necessary *locus standi in judicio* for complaining of corresponding illegalities on the part of the other states, especially if these were consequential on or were embarked upon in order to counter its own illegality- in short were provoked by it (...)" (Fitzmaurice, 1957). Thus, the "unclean hands" of Nicaragua, according to Schwebel, constituted sufficient reason to deprive it of the necessary *locus standi in iudicio* to complain about corresponding US illegalities since these were precisely consequent or they had however become necessary to deal with the illicit conduct previously carried out by Nicaragua, "in short they were provoked by it".[177]

Judge Schwebel concluded that the doctrine of the clean hands finds basis and was applied in the case against Nicaragua excluding that the *locus standi in judicio* considers the relevant question to be inadmissible. The statements of judge Schwebel are also taken into consideration by judge Mosler: "(…)

op. cit.

[177]ICJ, Case Concerning Military and Paramilitary Activities in and Against Nicaragua, (Nicaragua v. United States of America), dissenting opinion of judge Schwebel, op. cit., par. 272.

Nicaragua (…) was aware of the deficiency and could easily have clarified the situation (but) failed to do so. It cannot take advantages of uncertainties which it knowingly left unchallenged (…)".[178]

Judges Schwebel and Mosler offered a precise indication for the doctrine of the clean hands, which is applied in interstate disputes, thus, allowing to exclude from a complaint of illicit conduct of the counterparty, which takes into consideration the consequence of the violation of synallagmatic obligations.

(Follows). The Gabčíkovo-Nagymaros project (Hungary v. Slovakia)

The doctrine of clean hands was questioned by the ICJ itself in the Gabčíkovo-Nagymaros case (Amerasinghe, 2011), highlighting the failures of the parties, which underlined how the facts deriving from the illicit conduct cannot influence the relevant law applicable in the relationships between the parties.[179]

[178]ICJ, Case Concerning Military and Paramilitary Activities in and Against Nicaragua, (Nicaragua v. United States of America), dissenting opinion of judge Schwebel, para. 464.

[179]ICJ, Gabčíkovo-Nagymaros Project, (Hungary v. Slovakia), op. cit., para. 133: "(…) the court, however, cannot disregard the fact that the Treaty has not been fully implemented by either party for years, and indeed that their acts of commission and omission have contributed to creating the factual

The principle of *ex injuria non oritur actio* was invoked in relation to the procedural rights in the parties with reference to the rights and obligations of a substantive nature deriving from an agreement that was not correctly implemented.

In this regard, the ICJ stated that: "(...) the right to suspend and subsequently abandon, in 1989, the work on the Nagymaros project and part of the Gabčíkovo project for which it was responsible (...)". Czechoslovakia did not have the right to operate the barrier system in question in October 1992.

Hungary should have compensated Slovakia, as successor, for the damage suffered by Czechoslovakia due to Hungary's suspension and abandonment of works within its competence, while Slovakia should have compensated Hungary for the damage it had suffered due to the commissioning of the dam by Czechoslovakia. Its maintenance in service by Slovakia confirmed the application of the principle *ex iniuria ius non oritur* in the following terms: "The court (…) cannot ignore the

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situation that now exists. Nor can it overlook the factual situation-or the practical possibilities and impossibilities to which it gives rise-when deciding on the legal requirements for the future conduct of the parties. This does not mean that facts-in this case facts which flow from wrongful conduct-determing the law. The principle *ex injuria jus non oritur* is sustained by the court finding that the legal relationship created by the 1977 Treaty is preserved and cannot in this case treated as voided by unlawful conduct (…)".

fact that the (Budapest) Treaty has not been fully implemented by either party for years, and indeed that their acts of commission and omission have contributed to creating the factual situation that now exists. Nor can it overlook that factual situation-or the practical possibilities and impossibilities to which it gives rise-when deciding on the legal requirements for the future conduct of the parties. This does not mean that facts-in this case, facts which flow from wrongful conduct-determine the law. The principle *ex iniuria jus non oritur* is sustained by the courts finding that the legal relationship created by the 1977 Treaty is preserved and cannot in this case be treated as voided by unlawful conduct (…)".[180]

The principle *ex iniuria jus non oritur* did not present the validity of the substantive law which was applicable between the parties, i.e. according to the bilateral treaty of 1977. We are talking about a substantial application which does not place the operation of the clean hands doctrine as a principle having a procedural substance. In this regard, the ICJ did not apply the doctrine of clean hands given that its interpretation was based on the principle of equity and Hungary's basic right is to an "equitable and reasonable sharing the resources of an international

[180]ICJ, Gabčíkovo-Nagymaros Project, (Hungary v. Slovakia), op. cit., para. 133.

watercourse.[181]

The ICJ applied the clean hands doctrine by permitting and verifying illegality that goes beyond the proportionality of Hungary's provocative position.

(Follows). Legality of use of force (Yugoslavia v. some NATO members)

The case of the legality of use of force during humanitarian intervention by some members of NATO has paved the way to apply the doctrine of the clean hands and to prevent a judgment in favor of a state subject to humanitarian intervention (Pomson, Horowitz, 2015).

The discussion has to do with the admissibility for a state that has committed serious violations of human rights and which has been the object of humanitarian intervention (Franck, 1990; Independent International Commission on Kosovo, 2000; Shaw, 2011).

The basis of this position was inspired by the central role that human rights have assumed in the international community since the Second World War (Crawford, 2012). The legitimacy of humanitarian intervention is not supported by the current

[181]ICJ, Gabčíkovo-Nagymaros Project, (Hungary v. Slovakia), op. cit., para. 78.

international law in a precise manner (Delbruck, 1992; Henkin, 1999; Chesterman, 2003).

The prohibition on the use of force, according to Art. 2, par. 4 of the UN Charter (Pellet, 2014), is interpreted restrictively and does not allow exceptions relating to self-defense, according to Art. 51 of the UN Charter, the actions of the Security Council and Chapter VII of the same Charter (Chesterman, 2003; Dinstein, 2004; pellet, 2014).[182]

The ICJ has never taken a position on any exceptions to the principle of non-intervention as we have seen in the Corfu Channel[183] and in Nicaragua v. U.S..[184]

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[182]According to Dinstein: "(…) apprehensive of any creative interpretation of the Charter, unless it is supported by consistent and uniform practice (…)".

[183]ICJ, Corfu Channel (United Kingdom of Great Britain and Northern Ireland v. Albania), 9 April 1949, I.C.J. Rep., 1949, pp. 4ss: "(…) the court can only regard the alleged right of intervention as the manifestation of a policy of force, such as has, in the past, given rise to most serious abuses and such as cannot, whatever be the present defects in international organization, find a place in international law. Intervention is perhaps still less admissible in the particular form it would take here; from the nature of things, it would be reserved for the most powerful states, and might easily lead to preventing the administration of international justice itself (…)".

[184]ICJ, Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America), op. cit., para. 108, 205: "(…) The

Humanitarian intervention is considered illegal according to the principles of international law (Pomson, Horowitz, 2015).

The clean hands doctrine has been used to prevent the state from invoking the relative responsibility of the state that has acted against serious violations of human rights (Lowe, Tzanakopoulos, 2014).[185] The complaints brought by Yugoslavia should not have been taken into consideration since Yugoslavia had not presented itself before the court based on the doctrine of the clean hands.[186]

The ICJ itself followed discarded positions on other bases

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principle of non-intervention involves the right of every sovereign state to conduct its affairs without outside interference; though examples of trespass against this principle are not infrequent, the court considers that it is part and parcel of customary international law (…) the principle forbids all states or groups of states to intervene directly or indirectly in internal or external affairs of other states (…)".

[185]"(…) a threat or use of armed force against another state that is motivated by humanitarian considerations (...)".

[186]ICJ, Legality of Use of Force (Serbia and Montenegro v. Canada), decision of 15 December 2004, ICJ Rep. 2004. Legality of Use of Force (Serbia and Montenegro v. Germany), decision of 15 December 2004, ICJ Rep. 2004. Legality of Use of Force (Serbia and Montenegro v. Portugal) ICJ Pleadings CR/99/21. Legality of Use of Force (Serbia and Montenegro v. United Kingdom) ICJ Pleadings CR/99/23. Legality of Use of Force (Yugoslavia v. United States of America) ICJ Pleadings CR/99/24.

(Swords, Willis, 2016) as it rejected: "(...) Yugoslavia (...) did not consider it necessary to address the topic relating to the "unclean hands" attributed to it (…) has not ruled on the existence or otherwise of clean hands in international law and on its qualification and applicability to cases concerning humanitarian intervention (…)" (Swords, Willis, 2016).

Already in a dissenting opinion the judge Weeramantry stated that: "(...) it is patently clear (...) that it is a precondition to the granting of any relief to the applicant that if the applicant is engaged on a course of violence relevant to the subject-matter of the application, that violence should immediately cease (…)".[187] It was a problem that should have been left to the merits, a stage that was never reached due to the declaration of lack of jurisdiction.[188]

[187]ICJ, Yugoslavia v. Belgium, Provisional Measures (n 49), Dissenting Opinion of Vice-President Weeramantry, para. 184.

[188]ICJ, Serbia and Montenegro v. Belgium, Preliminary Objections, para. 155.

The relationship between the doctrine of clean hands and humanitarian interventions

The discussions regarding humanitarian interventions have always been different, cloudy from a political, interpretative and less legal point of view but they have always had a basis of support and starting point that of the protection of human lives and human rights in general.

As we saw in the Legality of use of force case the ICJ did not take a precise position on the existence of the clean hands doctrine as a doctrine in international law and from the relationship between clean hands and humanitarian intervention. The *jus cogens* statute and the prohibition on the use of force prevent the applicability of the clean hands doctrine in relation to disputes relating to humanitarian interventions. The *jus cogens* of a norm does not replace the procedural application of the rules (Esposito, 2012; Bastin, 2012; Klinzing, 2014).[189]

[189]ICJ, Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), 3 February 2012, in I.C.J. Rep., 2012, para. 92ss, affirmed that: "(…) the rules of the law of armed conflict which prohibit the murder of civilians in occupied territory, the deportation of civilian inhabitants to slave labour and the deportation of prisoners of war to slave labour are rules of *jus cogens*, there is no conflict between those rules and the rules on state

If the doctrine of clean hands is connected with a procedural rule, these are rules that develop their operations on different levels. The hierarchy of an international norm that has a substantive character can overcome the procedural barrier to its application. An application of a positive nature where the clean hands doctrine has the potential for development by blocking the claims of the state that attacks the basis of humanitarian intervention. This procedural rule and its applicability does not influence the status of *jus cogens* and the prohibition on the use of force.

The Arrest Warrant Case (Democratic Republic of Congo v. Belgium)

The case of an international arrest warrant against the Congolese Minister of Foreign Affairs Mr. Abdoulaye Yerodia Ndombasi to obtain the relevant detention and extradition to Belgium for alleged international crimes as well as the submission of provisional measures obtaining an order of immediate

immunity. The two sets of rules address different matters. The rules of state immunity are procedural in character and are confined to determining whether or not the courts of one state may exercise jurisdiction in respect of another state. They do not bear upon the question whether or not the conduct in respect of which the proceedings are brought was lawful or unlawful (...)".

termination of the warrant of controversial arrest was dating back to 12 July 2000 (Orakhelashvili, 2002).[190]

The ICJ rejected the relevant Belgian request to remove the case from the register by arguing that: "(…) the circumstances, as they presented themselves to the court, (were) not such as to require the exercise of its power, under Article 41 of the Statute, to indicate provisional measures (…) the issuing of the disputed arrest warrant represented an act of the Belgian judicial authorities intended to allow the arrest on Belgian territory of a Minister of Foreign Affairs accused of war crimes and crimes against humanity (…) its simple issuance constituted a violation of an obligation of Belgium towards the DRC, as it had not respected the immunity of which Mr. Yerodia enjoyed himself as Minister in office (…)".[191]

In particular, the ad hoc judge Van den Wyngaert argued through a dissenting opinion according to which: "(…) the Congo was ill placed when accusing Belgium of exercising universal jurisdiction in the case of Mr. Yerodia. If the Congo had acted appropriately, by investigating charges of war crimes and crimes

[190]ICJ, Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), 14 February 2002, I.C.J. Rep. 2002 (Dissenting Opinion of judge Van den Wyngaert).

[191]ICJ, Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), op. cit., par. 382.

against humanity allegedly committed by Mr. Yerodia in the Congo, there would have been no need for Belgium to proceed with the case (…). The Congo did not come to the court with clean hands. In blaming Belgium for investigating and prosecuting allegations of international crimes that it was obliged to investigate and prosecute itself, the Congo acts in bad faith (…)".[192]

The clean hands doctrine supported by judge Van Den Wyngaert was acted in bad faith given that the obligation to investigate and prosecute the related crimes committed of an international nature had failed and then complained about the consequences they would have suffered (Fitzmaurice, 1957) (Schwebel, 1999).[193]

According to the opinion of Van Den Wyngaert Belgium was defective to exercise universal jurisdiction in the case of Mr. Yerodia. Indeed: "(...) a solid basis as Congo had presented itself before the court with "unclean hands". Congo had acted appropriately by investigating allegations of war crimes and crimes against humanity allegedly committed by Minister Yerodia in Congo, it would not have been necessary for Belgium

[192]ICJ, Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), dissenting opinion of judge Van den Wyngaert, para. 35.

[193]ICJ, Military and Paramilitary Activities in and against Nicaragua, (Nicaragua v. United States of America), dissenting opinion of judge Schwebel, op. cit., pp. 382-384.

to proceed with the arrest warrant (…) to have also attempted to transfer the dossier to Congo, to ensure that the Congolese authorities investigated and prosecuted the case (…)".[194]
The clean hands doctrine was not reported in the oral proceedings. According to the statements of the ad hoc judge the ICJ explicitly stated that Congo was not dealing with the case in the first instance.[195]

The oil Platform case (Islamic Republic of Iran v. United States of America)

The ICJ in the Oil Platform case of 6 November 2003 rejected the counterclaim that was brought by the United States seeking Iranian liability as it hindered freedoms of trade and navigation in the Gulf by attacking US ships and missile attacks and positioning of mines.
The focus of the issue dates back to a decision that the ICJ had to give regarding US actions, that affected the freedom of trade, guaranteed by Art. X, par. 1 of the Treaty of 1955. The ICJ held

[194]ICJ, Military and Paramilitary Activities in and against Nicaragua, (Nicaragua v. United States of America), op. cit., par. 383.
[195]ICJ, Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), dissenting opinion of the ad hoc judge Van Den Wyngaert, op. cit., p. 162, para. 35.

that where a state sought to destroy the means of production and transport of another state by means auxiliary to or relating to such transport it interfered with the freedom of international trade.

The ICJ stated that any interference with this type of activity would impact the freedom of trade between the territories of the parties as provided for by Art. X, par. 1 and which had to adopt a case-based approach.

In practice, the ICJ has rejected the actions proposed by the United States as well as the related requests for compensation. The United Nations asked the ICJ to reject Iran's relevant claim as well as to refuse relief based on the unclean hands of Iran that it was guilty of violating the Treaty of 1955 and related provisions of international law relating to the use of force (Borchard, 1915; Fitzmaurice, 1957).[196]

[196]ICJ, Oil Platforms (Islamic Republic of Iran v. United States of America), op. cit., para. 5.04, "(…) the principle that a party in litigation may not attempt to reap advantages from its own wrong-*nullus commodum capere de sua injuria propria*-is well established in international law. Numerous arbitral decisions reflect the unwillingness of international tribunals to grant relief to parties whose own conduct with respect to the underlying dispute was wrongful (…)". (See, e.g., Tippetts, Abbett, McCarthy, Sfratton v. TAM-AFFA, 6 Iran-U.S. C.T.R., pp. 219, 228 (1984): "(…) it is a well-recognized principle in many municipal systems and in international law that no one should be allowed to reap advantages from their own wrong,

The principles relating to this request by the US were based on the following statements. In the substantive phase, the US's preliminary nature was based on an anti-legal attitude on the part of Iran which placed the US actions which were denounced by the plaintiff state in the first phase. Therefore, they were violations of a bilateral treaty in force between the parties as well as a customary prohibition on the use of force.[197]

On the other hand, the US argued that Iran committed, during the

nullus commodum capere de sua injuria propria (...)". See also The Mary Lowell Case (1 879), 3 Moore Intl Arb., para. 2772, 2776: "(…) this illegality was of such a character as to carry with it forfeiture of the protection of the United States flag (...)". The Montijo Case (1875), 2 Moore Int'l Arb., pp. 1421, 1437 "(…) no one can be allowed to take advantage of his own wrong (...)"; The Medea and The Good Return Cases (1866), 3 Moore International Arbitration, pp. 2730, 2739: "(…) a party who asks for redress must present himself with clean hands (...)". According to Borchard: "(…) it is an established maxim of al1 law, municipal and international, that no one can profit by his own won and that a plaintiff or a claimant must come into court with clean hands (…)".

[197]ICJ, Oil Platforms (Islamic Republic of Iran v. United States of America), op. cit., par. 27: "(...) the Court will first consider a contention to which the United States appears to have attributed a certain preliminary character. The United States asks the Court to dismiss Iran's claim and refuse in the relief it seeks, because of Iran's allegedly unlawful conduct, i.e., its violation of the 1955 Treaty and other rules of international law relating to the use of force (…)".

actions against the platforms, an armed attack which was illegally demonstrated against the US. Neutral vessels in the Persian Gulf provoked US's reaction. The US government underlined that the principle of reciprocity required that another third state could observe the relevant obligations towards itself and the first state had violated the Treaty of 1955 in force between the parties towards the second.

The US held that a party may not be entitled to relief when the actions complained of are deemed to be in accordance with its own tortious conduct.[198] These were principles that the US immediately took into consideration the clean hands doctrine.

The US claimed that Iran invoked the same principles before the Iran-U.S. Claims Tribunal, asking that the disputes have deficiencies relating to US conduct.

In particular, the American government stated that: "(…) the claim should be dismissed under the universal, equitable doctrine of "clean hands". The doctrine, which is supported by a vast and

[198]ICJ, Oil Platforms (Islamic Republic of Iran v. United States of America), op. cit., par. 28: "(…) the United States invokes (…) three related principles (…). First, a party that acts improperly with respect to the subject-matter of a dispute is not entitled to relief; (…) a party that has itself violated obligations identical to those that are the basis for its application is not entitled to relief (…). Third, an applicant is not entitled to relief when the actions it complains of were the result of its own wrongful conduct (…)".

diverse body of international legal literature, state practice and international case-law, states that anyone wishing to bring a claim before an international court, must have acted, properly and correctly prior to the claim (…) (Aryeh v. Iran, Cases Nos. 842,843 & 844, Respondent's Hearing Memorial and Written Evidence, Vol. III, Doc. 80, Exhibit C, p. 44 (23 par. 1993) (Iran-U.S. Claims Tribunal), Exhibit 162) (…)".[199]

On the other hand, Iran tried to respond by arguing that the clean hands based on American arguments: "(...) reflecting and incorporating fundamental principles of law inspired by good faith is not an autonomous legal institution[200] (...) the plaintiffs' own wrongful conduct, as a reason for the inadmissibility of a complaint, applied only with regard to complaints arising in the context of diplomatic protection and therefore only concerned the "clean hands" of a foreign private individual, while this principle would be irrelevant in direct interstate disputes (…)".[201]

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[199]ICJ, Oil Platforms (Islamic Republic of Iran v. United States of America), op. cit., par. 5.06.

[200]ICJ, Oil Platforms, Reply and Defence to Counter-claim submitted by The Islamic Republic of Iran, 10 March 1999, para. 83.3, p. 176.

[201]ICJ, Oil Platforms (Islamic Republic of Iran v. United States of America), op. cit., par. 84: "(…) Iran responds that the concept of "clean hands" underlying these arguments of the United States, while reflecting and incorporating fundamental principles of law inspired by good faith, is not an

For Iran this principle can have legal meaning only in the merit phase and only in the damage quantification phase, but cannot deprive the state of the *locus standi in judicio.*[202]

The American objections were of a preliminary nature, suggesting that these are questions of inadmissibility.

In practice, the US did not ask the ICJ to consider Iran's requests as inadmissible, but asked for the total rejection of the request. The US could not argue before the ICJ that Iran's conduct was such that: "(...) precludes it from any right to the relief it seeks from this Court" or that it "should not be permitted to recover on its claim (…) the United States measures against the platforms were the consequences of Iran's own unlawful use of force (…) appropriate legal consequences should be attached to that finding

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autonomous legal institution. It contends that the concept of "clean hands" requires the operation of other institutions or legal rules for its implementation. Iran argues that the plaintiff's own wrongful conduct as a ground for inadmissibility of a claim relates to claims arising in the context of diplomatic protection and concerns only a foreign individual's "clean hands", but that such principle is irrelevant in direct state-to-state claims. According to Iran, as far as state-to-state claims are concerned, such principle may have legal significance only at the merit stage, and only at the stage of qualification of damages, but does not deprive a state of *locus standi in judicio* (…)".

[202]ICJ, Oil Platforms (Islamic Republic of Iran v. United States of America), op. cit., par. 85.

(…)".[203]

In this regard, the ICJ stated that the American arguments are not presented as an exception to inadmissibility but as a counter-memorial with the aim of obtaining relative recognition of the legitimacy of US actions to Iranian conduct. Thus, the ICJ imposed the legitimacy of US actions on Iranian conduct by requiring that the merits be examined and the relevant US claim be discussed at this stage.

In this regard, the ICJ did not take a precise position regarding the clean hands doctrine as a procedural principle of international law, reiterating that it is only a question of admissibility and thus confirmed the applicability in relation to the dispute as *in partem* was requested by the American defense.[204]

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[203]ICJ, Oil Platforms (Islamic Republic of Iran v. United States of America), op. cit., par. 29-30: "(…) the United States does no task the court to find Iran's claim inadmissible; it asks the court to dismiss that claim. It does not argue that the court should be debarred from examining the merits of the Iranian claim on the grounds of Iran's conduct; rather, it argues that Iran's conduct is such that it precludes it from any right to the relied it seeks from this court, or that should not be permitted to recover on its claim (…)".

[204]ICJ, Oil Platforms (Islamic Republic of Iran v. United States of America), op. cit., par. 29-30, "(...) the court notes that in order to make that finding it would have to examine Iranian and United States actions in the Persian Gulf during the relevant period-which it has also to do in order to rule on the Iranian claim and the United States counter-claim (…) at this stage of its

Certain Iranian Assets (Islamic Republic of Iran v. United States of America)

For US violations of the Treaty of Friendship, Economic Relations and Consular Rights signed by the two states in Tehran on 15 August 1955 and in force on 16 June 1957, the Islamic Republic of Iran against the US[205] began proceedings on 14 June 2016.

The US substantiated jurisdictional and admissibility objections based on abuse of process and the clean hands doctrine by stating that "(…) the US actions (…) derive from Iran's own unclean hands-as a sponsor of terrorism and its repeated violations of counter-terrorism, weapons proliferation, and arms trafficking obligations-(…) strongly counseling the court to decline any jurisdiction it may have over Iran's claims (…)".[206]

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judgement, therefore, the court does not need to deal with the request of the United States to dismiss Iran's claim and refuse the relief that it seeks on the basis of the conduct attributed to Iran. The court will now proceed to the consideration of the claims made by Iran and the defences put forward by the United States (…)".

[205]ICJ, Certain Iranian Assets (Islamic Republic of Iran v. United States of America), 13 February 2019, ICJ Rep No. 164, para. 1.

[206]ICJ, Certain Iranian Assets (Islamic Republic of Iran v. United States of America), op. cit., par. 6.1, 1.10, "(…) Iran's unclean hands should preclude the court from proceeding with this case. Iran's allegations against the

The US during the oral phase stated that clean hands is a kind of principle of abuse of process, specifying that the court held that: "(...) abuse of process and the "clean hands" doctrine were distinct concepts", the latter would have however, a sufficient basis in international law.

The court held that although the objections based on abuse of process and the clean hands doctrine could be considered related, in this case they were distinct issues in scope and supporting evidence. The court, therefore, examined first the objection based on the abuse of process and secondly the one based on the "clean hands" doctrine.[207]

The US emphasized that Iran's attempt to base the jurisdiction of the court on the treaty of 1955 (article XXI, par. 2) was an abuse of process since the fundamental conditions based on the treaty did not exist between the parties and Iran did not seek to claim a

United States are focused on U.S. measures that engage the legal and political responsibility of Iran as a sponsor of terrorism directed at the United States, its nationals, and others over the past forty years, as well as its persistent violations of counter-terrorism, weapons proliferation, and arms trafficking obligations. Iran comes to the court with unclean hands, and the court should decline to exercise any such jurisdiction it may have, given that the US measures that Iran now seeks to impugn were taken in response to Iran's own conduct (...)".

[207]ICJ, Certain Iranian Assets (Islamic Republic of Iran v. United States of America), op. cit., par. 106-107.

protected treaty interest but to involve the court in a strategic dispute of a broad nature.

In practice, the ICJ stated that: "(...) Iran and the United States had ceased diplomatic relations in 1980 following the Iranian revolution and the seizure of the United States Embassy in Tehran in 1979 (...) which only in exceptional circumstances could have rejected a claim based on a valid jurisdictional claim for abuse of process (…) as there had to be clear evidence that the plaintiff's conduct amounted to such an abuse (…) the treaty was formally in force between the parties at the date of filing of the complaint Iranian request and therefore the court rejected the first objection to admissibility (…)".[208]

Regarding the second preliminary admissibility objection, the US argued that proceeding with a lawsuit was necessary given that the other party, i.e. Iran, is presented with unclean hands[209]: "(…) Iran has sponsored and supported international terrorism, as well as taken destabilizing actions in contravention of nuclear non-proliferation, ballistic missile, arms trafficking, and counter-terrorism obligations (…)" (Miles, 2017).

According to the US the bombing of Beirut of 1983 at the

[208]ICJ, Certain Iranian Assets (Islamic Republic of Iran v. United States of America), op. cit., par. 114, 119.

[209]ICJ, Certain Iranian Assets, Oral Proceedings, Verbatim Record 2018/28, para. 24-25.

moment in which the US began to activate measures to deal with the relative Iranian support for terrorism was a reparation of the outcome of the Peterson case, where according to the American government it had given rise to Iranian support for terrorist activities.[210]

Therefore, the US stated that: "(…) the heart of this case is Iran's attempt to evade accountability for acts of terrorism directed at or affecting US persons that Iran has sponsored, that Iran has instigated, that Iran has procured, that Iran has financed, and in which Iran has conspired".

The accountability that Iran seeks to escape is established through US court proceedings pursuant to legislation that enables states to be held accountable for supporting terrorist acts. That is what this case is all about.[211] The principle that would be litigant with unclean hands is properly to be denied.[212]

The ICJ did not take a stand for a defense based on the clean

[210]ICJ, Certain Iranian Assets (Islamic Republic of Iran v. United States of America), op. cit., par. 24.

[211]ICJ, Certain Iranian Assets (Islamic Republic of Iran v. United States of America), op. cit., par. 4, p. 36 "(…) Iran now comes to the Court to seek assistance in evading those judgments. Iran comes to the Court with unclean hands (...)".

[212]ICJ, Certain Iranian Assets (Islamic Republic of Iran v. United States of America), op. cit., par. 4, p. 37.

hands doctrine but: "(…) has (never) rejected the principle and, indeed, we say, that the court in the Equatorial Guinea v. France[213] case accepted the existence of the closely related principle of abuse of process, subject to the appreciation that it only operates in "exceptional circumstances" and requires clear evidence that the conduct in question "could amount to an abuse of process"[214] (...) the time is ripe for the court to acknowledge it and apply it (…). It should not have proceeded with the examination of the merits in order to evaluate the legal consequences of the Iranian conduct given the obstacle represented by the "unclean hands" of the actor (…)".[215]

The clean hands doctrine did not have a precise and consolidated basis in the jurisprudence of the ICJ. In particular, recalling the words of John Dugard as Special Rapporteur of the ILC on diplomatic protection we noted that: "(…) it is difficult to sustain the argument that the clean hands doctrine does not apply to disputes involving direct inter-state relations. States have frequently raised the clean hands doctrine in direct inter-state

[213]ICJ, Immunities and Criminal Proceedings (Equatorial Guinea v. France), 6 June 2018, para. 150.

[214]ICJ, Certain Iranian Assets, Oral Proceedings, Verbatim Record 2018/28, op. cit., para. 15.

[215]ICJ, Certain Iranian Assets, Oral Proceedings, Verbatim Record 2018/28, op. cit., para. 117.

claims and in no case has the ICJ stated that the doctrine is irrelevant to inter-state claims (…). Similarly reached the conclusion that a number of states have maintained the vitality and applicability of the principle of clean hands in inter-state disputes and that the court has not rejected the principle (…)".[216]
In this regard, the US stated that: "(…) there is no stronger case for such a principle than the one before you, the case brought by Iran in these proceedings is calling for such an assessment (…)".[217]
On the other hand, Iran rejected the accusations of the US violating its anti-terrorism obligations. These were unfounded and irrelevant accusations for the resolution of the dispute. They could not provide a basis for excluding the admissibility of the relevant application[218] by stating that: "(...) there was no uncertainty about the substance and binding nature of the "clean hands" doctrine. The court had never recognized its applicability (…)". The "clean hands" doctrine could not be applied at the stage of preliminary objections however, it could not serve as a

[216]ICJ, Certain Iranian Assets, Oral Proceedings, Verbatim Record 2018/28, op. cit., para. 86.
[217]ICJ, Certain Iranian Assets, Oral Proceedings, Verbatim Record 2018/28, op. cit., para. 87.
[218]ICJ, Certain Iranian Assets (Islamic Republic of Iran v. United States of America), op. cit., para. 118.

basis for the inadmissibility of an application. It only applies when the claimant is engaged in "precisely similar action, similar in fact and similar in law as that of which it complains".[219]

The US objection position was unsatisfactory on the relevant requirement as the defendant could not provide relevant support for allegations that Iran's unclean hands amounted to a treaty violation.

The ICJ stated that even the demonstration of the appellant's behavior was not irreproachable and: "(...) not be sufficient *per se* to uphold the objection to admissibility raised by the respondent on the basis of the "clean hands" doctrine (…)" (Galbraith, 2019).[220] This ruling did not prejudice the examination of the accusations made by the United States regarding Iran's alleged sponsorship and support of international terrorism and its alleged actions regarding nuclear non-proliferation and arms trafficking, possibly, in the merit phase (Zimmermann, Tams, Oellers Frahm, Tomuschat, 2019).[221]

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[219]ICJ, Certain Iranian Assets (Islamic Republic of Iran v. United States of America), op. cit., parr. 119-121.

[220]ICJ, Certain Iranian Assets, (Islamic Republic of Iran v. United States of America), op. cit., para. 124. Avena and Other Mexican Nationals op. cit., p. 38, para. 47. Maritime Delimitation in the Indian Ocean (Somalia v. Kenya), 2 February 2017, I.C.J. Rep. 2017, p. 52, para. 142.

[221]ICJ, Certain Iranian Assets, (Islamic Republic of Iran v. United States of

The ICJ rejected the second objection relating to admissibility, because it sought to provide a legal basis for the clean hands doctrine. In particular, he noted that Iran presented itself before a judgment with unclean hands and asked to decide on the American measures, omitting the circumstance that Iranian conduct entails the same measures.

The ICJ stated that: "(…) should refuse to entertain Iran's claims on the merits in this case. Iran's claims against the United States-which derive from Iran's own violations of international law-are unsuitable for adjudication by the court (…) the general principles of law, inspired by fairness and the requirement of good faith, should lead us to refuse to consider Iran's claims on the merits (…)" (White, 2004).[222]

America), op. cit., para. 124.

[222]ICJ, Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria), 1998, I.C.J., para. 275, 296: "(…) the principle of good faith is a well-established principle of international law (…)"). Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway), 14 June 1993, I.C.J. Rep. 1983 (separate opinion of judge Shahabuddeen), para. 38, 19, "(…) equity itself being part of the law, there is no question either of equity correcting law or law correcting equity (...)". According to White: "(...) general understanding of the drafters of Article 38 appears to have been that (…) particular equitable principles, as recognized within the various legal systems of the world, might play a role as general principles of international law (...)".

They could not do otherwise because it would be a reward for Iran's international illicit conduct and as a consequence the United States took measures where Iran itself objected. These general principles constitute the clean hands doctrine and are expressed as *nullus commodum capere de sua injuria proprio* and *ex delicto non oritur actio* (Fitzmaurice, 1957).[223]

Such principles where took action for compensation for wrongful actions precluded and obtained actions, which result from the wrongful conduct of the other party recognizing the members of the ICJ[224] as well as the opinions of the judges, who have confirmed many times that the general principle should not be allowed to benefit their illicit behavior.

In speciem, according to the opinion of judge Ajibola regarding the convention on the prevention and repression of the crime of

[223]Judge Anzillotti in old case: Diversion of Water from the River Meuse (Netherlands v. Belgium) affirmed that: "(…) so just, so equitable, so universally recognized, that it must be applied in international relations also (…). It is one of these "general principles of law recognized by civilized nations" which the Court applies in virtue of Article 38 of its Statute (…)".

[224]ICJ, Certain Iranian Assets, op. cit., para. 6.30, which the court noted the old case: Gabčíkovo-Nagymaros, para. 110: "(…) the Court could not "overlook" that Czechoslovakia's act was a result of Hungary's own prior wrongful conduct" and finding that Hungary, by its own conduct, had prejudiced its right to terminate the Treaty (…)".

genocide: "(…) an applicant who "wants equity must do equity" implementing that the applicant "must come with clean hands" (…)".[225]

The ICJ evaluated the behavior of Iran and the US according to the Treaty of Friendship and in the Oil Platforms case excluding the possibility of evaluating the relevant circumstances which are different from the rejection of Iranian requests due to the fact that the acts torts are imposed by the US as a consequence of illicit conduct against Iran.[226]

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[225]ICJ, Application of the Convention and Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro), (Order on Further Requests for the Indication of Provisional Measures) I.C.J. Rep., 1993 (Separate Opinion of the judge Ajibola), para. 325, 395. Legal Status of Eastern Greenland (Dissenting Opinion of judge Anzilotti): "(…) an unlawful act cannot serve as the basis for an action at law (...)". Judge Read affirmed that: "(…) in any proceeding which recognized the principles of justice (…) profit from its own wrong (…)". Interpretation of Peace Treaties with Bulgaria, Hungary, and Romania, Advisory Opinion (Second Phase), 1950 I.C.J. 221, 244 (July 18) (Dissenting Opinion of judge Read). Judge Schwebel about the Military and paramilitary activities in and against Nicaragua case affirmed that: "(…) especially because, if these were illegalities, they were consequential on or were embarked upon in order to counter Nicaragua's own illegality (…)".

[226]ICJ, Oil Platforms (Islamic Republic of Iran v. United States of America), op. cit., para. 29.

The ICJ stated about this that: "(…) state practice similarly supports the continuing vitality of these general principles of law and equity, as states continue to invoke forms of the "clean hands" doctrine in a variety of circumstances (…)" (Liakopoulos, 2020b).[227] It was Iran itself that tried an argument that was based on the clean hands doctrine before the Iran-U.S. Claims Tribunal

[227]Preliminary Objections of the Kingdom of Belgium, para. 481. Legality of Use of Force (Serbia and Montenegro v. Belgium), which Belgium affirmed that: "(…) since (Yugoslavia) has acted, and continues to act, in bad faith [its] application must be considered inadmissible"); Verbatim Record of the Public Sitting of the ICJ Held on May 11, 1999, p. 23, para. 3.17, Legality of Use of Force (Yugoslavia v. United States), which United States noted that: "(…) does not come to the Court with clean hands"); Verbatim Record of the Public Sitting of the ICJ Held on May 11, 1999, p. 15-16, para. 24, Legality of Use of Force (Serbia and Montenegro v. United Kingdom), when United Kingdom affirmed that: "(…) deeply rooted in the essential nature of the judicial function (…) should be regarded as a general principle of law within the meaning of Article 38 of the Statute (…)". Verbatim Record of the Public Sitting of the ICJ Held on May 11, 1999, p. 11, para. 3.1.4, Legality of Use of Force (Serbia and Montenegro v. Portugal), which Portugal affirmed that: "(…) "[b]earing in mind the "clean hands" criterion, the request of the Federal Republic of Yugoslavia is not legitimate since the facts at the origin of Yugoslavia's request were caused by Yugoslavia's illicit conduct (...)"; Verbatim Record of the Public Sitting of the ICJ Held on May 11, 1999, pp. 15-16, para. 44, 48(d), Legality of Use of Force (Serbia and Montenegro v. Netherlands), which The Netherlands affirmed that: "(…)

underlining how: “universal” and “equitable” is the doctrine, “which is supported by a vast and diverse body of international legal literature, state practice and international case law”.[228] The ICJ emphasized that clean hands was widely recognized by the doctrine itself (Borchard, 1915; Jenks, 1964; Cheng, 1987).[229]

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extremely dirty hands from the other part (…)”. Verbatim Record of the Public Sitting of the ICJ Held on May 11, 1999, p. 10, para. 1.6, Legality of Use of Force (Serbia and Montenegro v. Germany), which Germany affirmed that: “(…) does not come to the court with “clean hands” (...)”. Verbatim Record of the Public Sitting of the ICJ Held on May 10, 1999, p. 7, para. 5, Legality of Use of Force (Serbia and Montenegro v. Canada).

[228]Aryeh v. Iran, Case No. 842, 843 & 844, Respondent’s Hearing Memorial and Written Evidence, Vol. III, (Mar. 23, 1993) (Doc. 80), Exhibit C, p. 44 (Iran-U.S. Claims Tribunal) (US Annex 187). Mohtadi v. Iran, Case No. 271, Award No. 573-271-3 (Dec. 2, 1996), 32 IRAN-U.S. Claim Tribunal Report 124, 134 (US Annex 188). Karubian v. Iran, Case No. 419, Award No. 569-419-2 (Mar. 6, 1996), 32 IRAN-U.S. Claim Tribunal Report, 3, 36 (US Annex 189).

[229]The Special Rapporteur James Crawford affirmed that: “(…) no basis for including the clean hands doctrine as a new circumstance precluding wrongfulness” (Second Report on State Responsibility, Mr. James Crawford, Special Rapporteur, [1999] 2 Yearbook of International Law Community, 3, 83, U.N. Doc. A/CN.4/SER.A/1999/Add.1 (Part 1) (US Annex 190)): “(…) such procedural questions as *locus standi* or the admissibility of claims (…) the principle that a state may not benefit from

The US followed a relative approach to the clean hands doctrine that respects the Oil Platforms case, moving on to the question that had to address as a preliminary exception the inadmissibility that was foreseeable in rejecting the ICJ itself.

The Jadhav case (India v. Pakistan)

In the Jadhav case (India v. Pakistan) the clean hands doctrine[230] was invoked before the ICJ. India accused Pakistan of violations of the Vienna Convention on Consular Relations of 1963. A proceeding which began on 8 May 2017. The dispute concerned the treatment of Indian citizen Mr. Kulbushan Sudhir Jadhav, as a prisoner, tried and sentenced to death after a long procedural dispute before a Pakistani military court (Baetens, 2019).
India stated that, on 3 March 2016, Mr. Jadhav had been "(…) kidnapped from Iran, where he was carrying on business after retiring from the Indian Navy and was then shown to have been

its own wrongful act is capable of generating consequences in the field of state responsibility but it is rather a general principle than a specific circumstance precluding wrongfulness (...)". Report of the International Law Commission on the Work of Its Fifty-Third Session, [2001] 2 Yearbook of International Law Community, 1, 72, U.N. Doc. A/CN.4/SER.A/2001/Add.1 (Part 2) (US Annex 191).

[230]ICJ, Jadhav Case (India v. Pakistan), 17 July 2019, I.C.J. Rep. 2019.

arrested in Baluchistan[231] on suspicion of espionage activities and sabotage (…). India stated that it was not informed of Mr Jadhav's detention until 22 days after his arrest and that Pakistan had not informed Mr Jadhav of his rights under the Vienna Convention. The Pakistani authorities subsequently refused to grant India consular access in favor of Mr Jadhav, despite requests (…)".[232]

On 23 January 2017, Pakistan initiated a request for assistance regarding investigations implicating Mr. Jadhav in espionage and terrorist activities stating that: "(…) consular access (to Mr. Jadhav would) be considered in the light of the Indian side's response to Pakistan's request for assistance in the investigation process (…)".[233]

India stated the connection with consular assistance in the investigation constituted a serious violation of the Vienna Convention. India asked the ICJ as an instance of provisional measures to: "(...) ascertain jurisdictional competence on the basis of the Optional Protocol to the Vienna Convention on Consular Relations; order the immediate suspension of the death sentence of the accused; declare that the sentence of the military court, issued in violation of the Vienna Convention on Consular

[231]ICJ, Jadhav Case (India v. Pakistan), op. cit., para. 13.

[232]ICJ, Jadhav Case (India v. Pakistan), op. cit., para. 14.

[233]ICJ, Jadhav Case (India v. Pakistan), op. cit., para. 28.

Relations and on Fundamental Human Rights as set out in the International Covenant on Civil and Political Rights, violated international law; prevent Pakistan from implementing the sentence passed by the military court and force it to take steps to annul the decision of the military court; to declare the court's decision illegal if Pakistan was not in a position to annul it, as being in violation of international law, and also to warn Pakistan against further violations of international law by giving effect to the sentence or sentence in any way and to push it to immediately release Mr. Jadhav (…)" (Shirlow, Gore, 2022).[234]

The ICJ on 17 July 2019 through a final ruling established its jurisdiction based on the Optional Protocol on Compulsory Dispute Settlement to the Vienna Convention. It has considered India's application admissible.

Pakistan declared India's complaint inadmissible based on India's malfeasance and the fact that India presented it before the ICJ with unclean hands and violated the *ex turpi causa non oritur actio* principle by having provided Commander Jadhav with a genuine Indian passport indicating the false Muslim identity with the related name of Hussein Mubarak Patel.[235]

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[234]ICJ, Jadhav case (India v. Pakistan), op. cit., parr. 28, 60.

[235]ICJ, Counter-Memorial of the Islamic Republic of Pakistan of 13 December 2017, para. 188, p. 53.

According to the defendant state, they were “principles” that found their basis through jurisprudence and especially in the Factory at Chorzòw case and in military and paramilitary activities in and against Nicaragua. Pakistan called “unclean hands” as the “basis” by some NATO members even in cases concerning the legality of the use of force.[236]

[236]See the verbatim transcript of 11 May 1999, para. 24, which is affirmed that: “(…) in considering whether or not to exercise that discretion, the court would weigh up all the equities. In weighing up all the equities, the court would pay particular attention as to whether the party seeking its assistance came with clean hands. The court would not, however, allow its process to be used as an engine ta assist turpitude. I can see no reason why exactly the same principles should not be applied by this honourable court. They are deeply rooted in the essential nature of the judicial function. They should be regarded as “general principles of law” within the meaning of Article 38 of the Statute (...)”. According to the United States agent: “(…) the principle that a party in litigation may not attempt to reap advantages from its own wrong is well established in international law (…) this principle is often expressed in the latin phrase *nullus commodum capere de sua iniuria propria* (…) no one can be allowed ta take advantage of his own wrong (…)”. Numerous arbitral decisions reflect the unwillingness of international tribunals to grant relief to parties whose own conduct with respect ta the underlying dispute was wrongful (see Diversion of Water from the River Meuse, p. 77). Since the court must assess all relevant circumstances in considering whether to grant provisional measures, it should take due account of this principle as well (…)”.

The ICJ rejected Yugoslavia's request to move forward with provisional measures on the basis of other grounds and without discussing the relevant argument to do with the clean hands doctrine. The major NATO powers argued that the clean hands doctrine according to Pakistan constituted consolidated proof of the existence of the doctrine of customary international law. According to the Pakistan government the reference to the clean hands doctrine in cases of legality of the use of force offered: "(…) an indication of the compelling reasons why the doctrine ought to be applied when the facts of the instant case are viewed in their proper context (…)".[237]

Pakistan mentioned the consultative process regarding the consequences of the construction of a wall in the occupied Palestinian territories.[238] The Pakistani government expressed the opinion of judge Elaraby who stated that: "(...) the general principle that an illegal act cannot produce legal rights-*ex injuria jus non oritur*-is well recognized in international law (…)".[239]

The respondent government took into account the Special Rapporteur on diplomatic protection of 11 August 2004: John

[237]ICJ, Jadhav Case (India v. Pakistan), op. cit., para. 202.

[238]ICJ, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, op. cit., p. 136.

[239]ICJ, Counter-Memorial of the Islamic Republic of Pakistan, op. cit., para. 204, p. 58.

Dugard of the ILC where the clean hands doctrine did not find application in diplomatic protection but excluded invocation in the context of direct interstate disputes.[240]

In this regard, Pakistan underlined the rejection of the exception of inadmissibility of the appeal based on the clean hands doctrine, mitigating the compensation that the ICJ had to recognize in favor of India in this substantive phase.[241]

[240]According to Dugart: "(…) the clean hands doctrine cannot be applied in the latter case that the injured individual for a violation of international law, first, because the claim has now assumed the character of an international, State v. State claim and secondly, because the individual has no international legal personality and thus cannot (outside the field of international criminal law) be held responsible for the violation of international law. In short, as a consequence of the fiction that an injury to a national is an injury to the state itself the claim on behalf of a national subjected to an internationally wrongful act becomes an international claim and the clean hands doctrine can be raised against the protecting state only for its conduct and not against the injured individual for misconduct that may have preceded the internationally wrongful act (…)".

[241]ICJ, Counter-Memorial of the Islamic Republic of Pakistan, op. cit., para. 221: "(…) further, or in the alternative, Pakistan respectfully submits that, even if the Court considers that the preliminary issues raised in Section III above (abuse of process, abuse of rights/good faith, *ex turpi causa*/clean hands) do not operate so as to render India' s claim inadmissible, the preliminary issues raised in Section III above nevertheless should militate against the granting of any relief to India (…)".

Supporting this approach, Pakistan referred to the US arguments in the oil platforms case.[242]

The Pakistani government recalled Article 39 of the International Law Commission on the responsibility of states for internationally wrongful acts, in accordance to which "(...) in the determination of reparation, account shall be taken of the contribution to the injury by willful or negligent action or omission of the injured state or any person or entity in relation to whom reparation is sought (…)".[243]

As defenses of the defendant, the relevant comment was recalled for which "(...) article 39 recognizes that the conduct of the injured state, or of any person or entity in relation to whom reparation is sought, should be taken into account in assessing the form and extent of reparation (…) the willful or negligent action or omission which contributes to the damage may be that of the injured state or any person or entity in relation to whom

[242]ICJ, Counter-Memorial of the Islamic Republic of Pakistan, op. cit., para. 225.

[243]Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries 2001. Text adopted by the International Law Commission at its fifty-third session, in 2001, and submitted to the General Assembly as a part of the Commission's report covering the work of that session (A/56/10), Yearbook of the International Law Commission, 2001, vol. II, Part Two.

reparation is sought was intended to cover not only the situation where a state claims on behalf of one of its nationals in the field of diplomatic protection, but also any other situation in which one state invokes the responsibility of another state in relation to conduct primarily affecting some third party (…)".[244]

The ICJ rejected the objection from Pakistan based on the clean hands doctrine and the principles *ex turpi causa non oritur actio* and *ex injuria jus non oritur* obtaining the relative inadmissibility of the appeal and the objection based on the clean hands doctrine which could not in itself put before a judgment as inadmissible the request for the presence of a valid title of jurisdiction.

The ICJ recalled the Certain Iranian Assets case affirming: "(…) even if it were shown that the applicant's conduct was not beyond reproach, this would not be sufficient to uphold the objection to admissibility raised by the respondent on the basis of the "clean hands" doctrine (…)".[245]

The ICJ rejected the Pakistani position as well as the clean hands doctrine was invoked. For the ICJ, Pakistan has based its positions on what we already have seen in the PCIJ in the Factory at Chorzòw case where it was stated that: "(…) generally

[244]ICJ, Certain Iranian Assets (Islamic Republic of Iran v. United States of America), preliminary objections, 13 February 2019.

[245]ICJ, Certain Iranian Assets (Islamic Republic of Iran v. United States of America), op. cit., para. 122.

accepted in the jurisprudence of international arbitration, as well as by municipal courts, that one Party cannot avail himself of the fact that the other has not fulfilled some obligation (…) if the former Party has, by some illegal act, prevented the latter from fulfilling the obligation in question (…)".[246]

Pakistan did not explain how wrongful act committed by India prevented Pakistan from fulfilling its obligation of consular assistance to Mr. Jadhav. The ICJ found that Pakistan's objection was thus based on the principle ex *turpi causa non oritur actio* and was thus not upheld.

The ICJ also reached a similar thought regarding the principle *ex injuria jus non oritur* indicating the related illicit behavior, which modified the law applicable in the relationships between the parties, as we saw in the Gabčíkovo-Nagymaros case.

For the ICJ, the clean hands doctrine was inadequate to the circumstances since the obligations of a receiving state allows consular access to the conditions of the clean hands of the sending state.[247]

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[246]PCIJ, Factory at Chorzòw case (Federal Republic of Germany v. Poland), op. cit., p. 31. See also the Gabčíkovo-Nagymaros Project (Hungary v. Slovakia), op. cit., p. 67, para. 110.

[247]ICJ, Gabčíkovo-Nagymaros Project (Hungary v. Slovakia), op. cit., p. 76, para. 133.

The outcome of the dispute resulted in the ICJ finding people suspected of espionage. However, they did not exclude the protection offered under Art. 36 of the Vienna Convention. Mr. Jadhav, according to Art. 36, par. 2, letter b), deprived India of the right to provide the assistance that was foreseen and Pakistan violated its obligations.

ICJ, advisory proceedings and clean hands doctrine

Following the previous research of non-contentious proceedings, we can notice that the clean hands doctrine has only been called upon once before the ICJ in relation to the advisory opinion on the construction of the wall in the occupied Palestinian territories.

In practice, the Israeli government spoke about the acts of violence that were committed against Israel by stating that Palestine tried to ask not only for explanations for the situation created but also for a relative remedy for its own illicit actions.[248]

[248]ICJ, Legal Consequences of the construction of a wall in the occupied Palestinian territory, Advisory Opinion of 9 July 2004, pp. 136ss, para. 63: "(…) Israel has contended that Palestine, given its responsibility for acts of violence against Israel and its population which the wall is aimed at addressing, cannot seek from the court a remedy for a situation resulting from its own wrongdoing. In this context, Israel has invoked the maxim

The ICJ rejected the Israeli positions based on the non-existence of the relevant doctrine and that it was not Palestine that initiated the proceedings. Therefore, the opinion is requested by the UN General Assembly.[249]

The construction of the wall prevented the Palestinian people from exercising their right to self-determination as well as the power/right to create the related *de facto* annexation,[250] therefore, the General Assembly asked the ICJ to provide the advisory opinion stating that: "(...) the legal consequences arising from the construction of the wall being built by Israel, the occupying Power, in the Occupied Palestinian Territory, including in and around East Jerusalem, as described in the Report of the Secretary-General, considering the rules and principles of

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nullus commodum capere potest de sua injuria propria, which it considers to be as relevant in the advisory proceedings as it is in contentious cases Therefore, Israel concludes, good faith and the principle of "clean hands" provide a compelling reason that should lead the court to refuse the General Assembly's request (…)".

[249]ICJ, Legal Consequences of the construction of a wall in the occupied Palestinian territory, op. cit., para. 64: "(…) the court does not consider this argument to be pertinent. As we emphasized earlier, it was the General Assembly which requested the advisory opinion, and the opinion has to be given to the General Assembly, and not to a specific state or entity (…)".

[250]ICJ, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, ICJ, 9 July 2004.

international law, including the Fourth Geneva Convention of 1949, and relevant Security Council and General Assembly resolutions (…) cannot seek from the Court a remedy for a situation resulting from its own wrongdoing (…)".[251]

Israel requested *nullus commodum capere potest* (*de sua injuria proprio*) believing that this maxim was important for consultative proceedings and for litigation. Israel stated, in this regard, that: "(...) good faith and the principle of clean hands provide a compelling reason that should lead the court to refuse the General Assembly's request (…)" (Whitman, 2018).

The ICJ was to decide on the relevant jurisdiction and provide a relevant opinion required for the affirmative answer, as a reason refusing to exercise the relevant power. The jurisdiction verified the reasons for refusing the requested advisory opinion. Israel sought to prevent the ICJ from expressing its opinion on the basis of the clean hands doctrine. On the other side of this argument Israel responded that: "(...) *nullus commodum capere potest de sua injuria propria*, "Palestine", given its responsibility for acts of violence against Israel and its population which the wall is aimed at addressing, cannot seek from the court a remedy for a situation resulting from its own wrongdoing (...)[252] the court has a

[251]ICJ, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, ICJ, op. cit., par. 63.

[252]Letter dated 29 January 2004 from the Deputy Director General and Legal

discretion whether to give the requested opinion. In the past, it has emphasized that it would refrain from giving an opinion when to do so would be incompatible with its judicial functions. This is just a case. Palestine does not come to the court with clean hands (…) equitable principles of good faith and "clean hands" are widely acknowledged in Court's jurisprudence, as also are their corollaries of bad faith and abuse of rights (…)".[253] According to the dissenting opinion of judge Hudson related to the diversion of water from the river Meuse case, Israel sustained that "(…) this is a request for an advisory opinion, it is difficult to conceive of a case to which judge Hudson's injunction to the

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Advisor of the Ministry of Foreign Affairs, together with the Written Statement of the Government of Israel, para. 64.

[253]ICJ, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, ICJ, op. cit., para. 9, noted the case of the PCIJ: Factory at Chorzòw case (Federal Republic of Germany v Poland), op. cit., p. 167. See also: Legal Status of Eastern Greenland, (Denmark v. Norway), op. cit., p. 95. Diversion of Water from the Meuse (Netherlands v. Belgium), op. cit., dissenting opinion of judge Anzilloti, p. 50 and of judge Hudson, p. 77. United States Diplomatic and Consular Staff in Teheran, Judgment, I.C.J. Reports 1980, p. 3, dissenting opinion of judge Morozov, pp. 53-55, and of judge Taranzi, pp. 62- 63. Military and Paramilitary Activities in and Against Nicaragua, (Nicaragua v. United States of America), op. cit., dissenting opinion of judge Schwebel, para. 240 and 268- 274.

Court to act is more appropriately suited (…). "Palestine" is responsible for the terrorism which the fence is aimed at addressing. This cannot be ignored. It cannot be open to a party to seek a remedy from a court in circumstances in which it has committed the wrong that has brought about the very situation which is under examination. This follows from the principle *nullus commodum capere de sua injura propria*-no one can be allowed to reap advantage from his own wrong-a principle which is just as pertinent in advisory proceedings which seek to raise for assessment questions which are essentially contentious (…)".[254]

According to the ICJ the existence of the clean hands doctrine rejected its applicability in relation to the consultative function of the ICJ because: "(…) it was the General Assembly which requested the advisory opinion, and the opinion is to be given to the General Assembly, and not to a specific state or entity (…)".[255]

This position is based on the theory of the clean hands as an object of evaluation and as an illicit act or fact. The use of the expression *nullus commodum capere potest de sua injuria* or the doctrine of the clean hands did not prejudice the relative

[254]Letter dated 29 January 2004, op. cit., para. 9.4.

[255]ICJ, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, op. cit., para. 64.

competence of the ICJ to decide through an advisory opinion given that the Court of the UN could formulate the relevant request and not a state where the unclean hands could be a point of reference (Uchkunova, 2016).[256]

Indirect interstate disputes and clean hands doctrine

Indirect interstate disputes are part of the macro cycle of disputes that can cause damage. These are completely different from the liability principle which comes from diplomatic protection.

In speciem, diplomatic protection is part of the *ius gentium,* which allows the state to invoke the international responsibility of another state through jurisdictional and diplomatic means, obtaining the relevant compensation for damages suffered by one of its own citizens.

In this regard, the ILC, which adopted the relevant draft articles in 2006, stated that: "(...) diplomatic protection consists of the invocation by a state, through diplomatic action or other means of peaceful settlement, of the responsibility of another state for an injury caused by an internationally wrongful act of that state to a natural or legal person that is a national of the former state

[256]ICJ, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, op. cit., para. 63-64.

with a view to the implementation of such responsibility (…)".[257]
Diplomatic protection is verified through an illicit international act when a host state has caused damage to the foreigner. The international complaint has to do with the state of nationality as a private individual is allowed to act internationally.
According to Emmerich Vattel, this is a legal fiction (De Vattel, 1758). which found its basis on the ruling of the Mavrommatis case.[258] In this case the state followed the diplomatic protection and on an international level its own right.
The responsibility between the aggressor state and the indirectly injured state is part of the scope of interstate relations. According to Shapolavov, "(…) by exercising diplomatic protection, the state brings the claim of its national to the state-to-state level, making it an inter-state dispute (…)" (Shapovalov, 2005).
On the subject, the Special Rapporteur of the ILC John Dugard, in his Sixth Report on Diplomatic Protection stated that: "(...) the clear distinction between the claim of the state as such and the claim by way of diplomatic protection since, in particular, the risk that the state comes to be configured as a mere agent of the private (...) one of the cornerstones of diplomatic protection is that "once a state has taken up a case on behalf of one of its

[257]Art. 1 of the Project of Article in Diplomatic Protection of 2006.
[258]PCIJ, Mavrommatis Palestine Concessions (Greece v. United Kingdom), PCIJ Reports, 1924, Series A, No. 2, p. 12.

subjects before an international tribunal, in the eyes of the latter the state is the sole claimant". Surely it is not suggested that we should abandon this fiction and instead see the state in a claim for diplomatic protection as simply the agent acting on behalf of its national interest.[259]

Of course, the issue whether the doctrine of clean hands has a certain meaning remains. Important is also to explain the relationship of such a doctrine with diplomatic protection as well as to verify whether it has been recognized with respect to direct interstate disputes and whether it constitutes an element in practice.

The applicability of the clean hands doctrine to diplomatic protection includes a twofold test. The first which considers whether the doctrine is applicable, first of all, to interstate disputes. Diplomatic protection is represented as *fictio juris.* The damage is caused only to the private/individual and the state has its own nationality considering the injured party to be subject of the relevant judgment. The second test concerns whether the clean hands doctrine employs the inadmissibility of the appeal. If the conclusions of both tests are positive, the clean hands doctrine is an intrinsic elementary requirement for the exercise of

[259]Sixth Report of the Special Rapporteur, Mr. John R. Dugard (57th Session of the ILC), 2005, A/CN.4/546, para. 7.

diplomatic protection (Shapovalov, 2005).

The disputes relating to diplomatic protection are not the same as those of classical interstates and the connotation of the parties who come to theorize and include the hands clean doctrine as state conduct in the context of diplomatic protection. A state presents itself to the ICJ with unclean hands and may be eligible to obtain the relevant remedy for a wrong suffered by its citizen or the state of its nationality.

The relationship concerning responsibility between states and the clean hands doctrine arises from the tort committed against a natural or legal person. Jean Salmon states, in this regard: "(…) contested the formation, the reason for being and the opportunity of an autonomous theory of clean hands with regard to diplomatic protection (Salmon, 1964) (…) understood as a right of a state not to act in diplomatic protection in favor of a citizen who has "stained" himself with unclean hands, the rule would be nothing other than a case of application of the discretionary nature of diplomatic protection, so that, in essence, devoid of any usefulness (...) as a reason that can lead an international tribunal to reject an appeal on the merits or to grant a reduced compensation because it (...) would not find support in jurisprudential practice and would not satisfy the interests of

justice (…)".[260]

In a completely different path, Louis Cavarè in 1967, as a member of the Institute de droit international, stated that: "(…) the loss of diplomatic protection, the incorrect behavior of the foreigner (Cavarè, 1953) (…) is a duty of loyalty towards the host state, a duty that is considered transgressed when the individual violates the law of the forum or carries out hostile acts towards the host state (Cavarè, 1953) (...) even where similar hypotheses occur, the loss of diplomatic protection is not total. The state of nationality will in fact be able to intervene only if the host state adopts excessive repressive measures contrary to international law or grants the citizen less favorable treatment than that reserved for other foreigners in the same conditions (...) framing diplomatic protection in the sphere of state prerogatives connected to international responsibility (therefore to the commission of an offense and not to the imposition of a legitimate sanction by the host state) it is already excluded that the clean hands doctrine may have any reason to exist other than an offense has occurred by the host state (…)".[261]

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[260]Sixth Report of the Special Rapporteur, Mr. John R. Dugard (57th Session of the ILC), 2005, A/CN.4/546, p. 259.

[261]Sixth Report of the Special Rapporteur, Mr. John R. Dugard (57th Session of the ILC), 2005, A/CN.4/546, p. 259.

Continuing with the theories of Rousseau who theorizes the principle illustrating that the application of the clean hands doctrine goes in the opposite direction. According to Rousseau, the previous theories of Reuter and Salmon have contradictorily indicated the exception of inadmissibility as a refusal to grant protection and as a valid reason for rejecting the complaint on the merits (Rousseau, 1983). The clean hands doctrine was theorized by Rousseau as conduct contrary to internal legislation where the host state is contrary in theories of international law (Rousseau, 1983).

For Rousseau: "(...) the protection of the foreigner under the law of the host state presupposes that he acts in accordance with the rules of the internal legal system (except in the extreme case in which one of these rules is contrary to the principles of international law); so that the foreigner could not make a claim for compensation for damages caused by his own violation of the law (...) the arbitration practice was not univocal and that the violation of the internal law of the host state was not unanimously considered to be the cause of inadmissibility of the complaint but, rather, considered in the substantive phase leading, as a result, to the rejection of the complaint (...) the violation of international law (...) having analyzed the relevant practice (concerning the slave trade and actions contrary to the

neutrality declared by the state of belonging), noted that the fluctuating and sporadic use of the rule did not allow the individual's wrongdoing to be considered an obstacle to the admissibility of international appeals and that therefore the rule did not become part of customary international law (...)" (Rousseau, 1983).

According to the opinion of Pastor Ridruejo in the Barcelona Traction case (Ngobeni, 2012)[262] state practice and international jurisprudence verifying that the clean hands doctrine gives "no confirmation of the doctrine in question". The behavior of the private individual could have certain consequences on the decision on the merits, in the sense of reducing the illicit nature of the host state's conduct as a response to the offense committed by the private individual and the consequent amount of compensation. It would therefore be a para-legal question that addresses the ethical sense of the judge, who, while applying the relevant legal rules, should take them into account in the overall evaluation of the case; even in this "soft" connotation, in any case asserts only in the merit phase and never as an exception of inadmissibility of the case (Ngobeni, 2012).[263]

[262]ICJ, Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain) (New Application: 1962), (second fase), 5 February 1970, in I.C.J. Rep., 1970.

[263]ICJ, Barcelona Traction, Light and Power Company, Limited (Belgium v.

The exercise of the clean hands doctrine as a cause of inadmissibility of an international complaint and for the protection of a private individual comes out from Schapovalov's positions which are based on international jurisprudential practice. He states: "(...) that the clean hands doctrine as a question of admissibility is incorrect. The clean hands doctrine is a question of substantive law, not a procedural question referring to the admissibility of the claim, and may be raised and considered during the consideration of merits and examined on a case by case basis. The result of this is that the clean hands doctrine cannot preclude states from exercising protection, since it will be considered when the diplomatic protection has already been exercised (…)" (Shapovalov, 2005).

Amerasinghe goes further claiming that: "(…) the doctrine is not an absolute one (…); because it is based on good faith, which is an important fundamental principle of international law, it has to be taken into account. But, as the practice of ICJ shows, it is a flexible doctrine subject to adaptation (Amerasinghe, 2011) (…) is not clear whether the doctrine in direct inter-state cases, when it is applied, must result in dismissal of the case or could work as a source of mitigation or extenuation of offenses (…) the defense of "unclean hands" not only is one which pertains to the merits

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Spain) (New Application: 1962), op. cit.

and not to admissibility, as the few relevant cases show, but is no more than one which is to be used to secure fairness and justice for the host state where the conduct of one or the other of two parties involved in the case may be questionable (…)" (Amerasighe, 2011).

From the opinions just exposed above we can distinguish two possible meanings of the clean hands doctrine, which are part of the context of diplomatic protection (Shapovalov, 2005; Amerasinghe, 2011).[264]

We are talking about the inadmissibility of the action where the foreigner's state of nationality is based on illicit conduct that has to do with the host state and the related wrong that the citizen has suffered. On the other hand, the inadmissibility of the action has suffered a prejudice, as a consequence of the illicit conduct (Pastor Ridruejo, 2007)[265] considering that the clean hands

[264]According to Shapovalov "(...) first, the clean hands doctrine can preclude a state from exercising diplomatic protection if it has acted in a similar manner to foreign nationals. Second, the doctrine may preclude diplomatic protection when the protecting state acted unlawfully in a particular case involving its national and consequently has made its hands unclean (...)".

[265]"(…) el pretendido requisito de la conducta corecta del perjudicando (...) la conducta incorrecta del reclamante, por violacion del Derecho interno del Estado reclamando o del Derecho internacional, motivaria la inadmissibilidad de la proteccion diplomatica (…)".

doctrine (Rousseau, 1983)[266] is connected with the clean hands doctrine and with diplomatic protection (Amerasinghe, 2011).[267] In this point, we recall *ex novo* the words of the special rapporteur John Dugard[268] who stated: "(...) no action arises from willful wrongdoing", which has its origins in two Latin brocards, namely, *ex dolo malo non oritur actio* and *nullus commodum capere potest de injuria sua propria* (…). In the context of diplomatic protection the doctrine is invoked to preclude a state from exercising diplomatic protection if the national it seeks to

[266]"(…) d'après une pratique fréquentement appliquée pal la jurisprudence arbitrale, un Etat ne peut présenter de réclamation international en faveur d'une personne physique ou morale que si celle-ci a eu une conduit correcte à l'égard de l'Etat prétendument responsable. En d'autres termes, suivant une expression imagée des auteurs anglais et américains, le réclamant doit avoir les mains propres (clean hands) pour pouvoir bénéficier de la protection diplomatique de l'Etat don 't il est le ressortissant (...)".

[267]According to Amerasinghe: "(…) the clean hands doctrine may apply in respect of both state and alien (…) Both (…) must come to the court with clean hands as against the host state. (…) The solution (…) happens to favour Amerasinghe (…) the host state but (…) this does not interfere with the requirements of justice (…) even though the result would be that the individual loses protection through no fault of his own. The Vattelian conception of diplomatic protection as a right of the state (…) would logically and pragmatically prevail (…)".

[268]Sixth Report of the Special Rapporteur, Mr. John R. Dugard, op. cit.

protect has suffered an injury in consequence of his or her own wrongful conduct (…). The state of nationality appears in court with "clean hands" since what is of importance is, rather, the conduct of the private individual (…)".[269]

The clean hands doctrine autonomously assumes the exercise of diplomatic protection that respects direct interstate disputes. The wrongdoing of the private individual prevents the action of the state of diplomatic protection from corresponding to the state of modern international law as we see in the LaGrand and Avena cases where the defendant, i.e. the US did not refer to incorrect behavior of private individuals to that of states of nationality, i.e. Germany and Mexico.

In the context of this type of disputes which enters the sector of diplomatic protection, the clean hands doctrine respects its application directly in interstate disputes. The injured citizen is extraneous to the international dispute, that arises from the offense committed by the host state, which equates the damage caused to the citizen with damage caused to the state of origin

[269]According to Sir G. Fitzmaurice: "(…) he who comes to equity for relief must come with clean hands. Thus a state which is guilty of illegal conduct may be deprived of the necessary *locus standi in judicio* for complaining of corresponding illegalities on the part of other states, especially if these were consequential on or were embarked upon in order to counter its own illegality-in short were provoked by it (...)".

and his behavior takes on relevance by applying the clean hands doctrine, which prevents the state from exercising protection when the illicit conduct is not imposed by the state itself but by its own citizen.[270]

The exclusion of the clean hands doctrine which are linked to the nature and function of the institution of diplomatic protection excludes the related doctrine as a condition of admissibility. The deprivation by the state that a citizen has of his own citizenship of his own right and of acting because one of its own citizens has committed a crime not in line with the principle of non-attribution to an illicit act, that is implemented by a private individual to the state of citizenship.

The state that "claims" the right to citizenship remains uninvolved in the offense committed by its citizen. Moving forward from the positions of the ILC that we have seen, considering that the state can act in diplomatic protection and on the behavior of other states when it has behaved towards foreign citizens has the consequence that a private individual may not benefit from the protection without any fault and the principle *inadimplenti non est adimplendum* in direct interstate disputes

[270]ILC's Draft Articles on Responsibility of States for Internationally Wrongful Acts, U.N. GAOR., 56th Sess., Supp. No. 10, 29, Doc. A/56/10 (2001) "(…) as a general principle, the conduct of a private persons or entities is not attributable to the state under international law (...)".

and does not make the special rule dealing with diplomatic protection necessary.
The rule is understood when the citizen only requests the protection of his own state. The clean hands doctrine is added to a new institution where the individual subject is not able to claim the relative protection as an existing right of diplomatic protection and by its own state but only as a faculty/right vested in the state.[271]

The LaGrand and Avena cases

In the LaGrand case on 2 March 1999 a complaint was brought before the ICJ by the Federal Republic of Germany against the US in a dispute which related to violations of the Vienna Convention of 1963 on consular relations. Already since 1982 Germany claimed that the authorities of the state of Arizona arrested two German citizens: Karl and Walter LaGrand, tried and sentenced to death without even being informed of their rights as required by Art. 36, par. 1, lett. b) of the Vienna Convention.
In this regard, Germany argued that: "(...) the lack of notification, required pursuant to Articles 5 and 36 of the same Convention,

[271]See also: R. v. Secretary of State for Foreign and Commonwealth Affairs ex parte Abbasi (2002) EWCA Civ. 1598.

had prevented it from protecting the interests of its citizens at the procedural level before the US Courts (...) with the assistance of German consular officers - had asserted violations of the Vienna Convention before the federal court, the latter, applying the municipal law of "procedural default", had decided that, since the same violations had not been alleged in the previous proceedings to state level, the exception could not be raised, for the first time, in federal proceedings (…)".[272]

The US argued that according to the principles of the administration of justice and equality the parties called US norms which for Germany did not seem to be accepted, *rectius negati.*[273]

The objection of the US was that the clean hands doctrine should be considered inadmissible since the German government claimed to apply a different standard from that which was practiced.[274]

[272]ICJ, LaGrand (Germany v. United States of America), 27 June 2001, para. 61-63.

[273]ICJ, LaGrand (Germany v. United States of America), op. cit., par. 61.

[274]ICJ, LaGrand (Germany v. United States of America), op. cit., par. 61: "(...) the United State also contends that Germany's submissions are inadmissible on the ground that Germany seeks to have a standard applied to the United States that is different from its own practice. According to the United States, Germany has not shown that its system of criminal justice requires the annulment of criminal convictions where there has been a breach of the duty of consular notification; and that the practice of Germany

Within this context, the ICJ did not examine the case and above all the objection proposed by the US which resulted in the unacceptability of the case. The ICJ limited itself to observing only the evidence that is proposed by the US and the relevant German jurisprudence as insufficient evidence to demonstrate that Germany did not comply with the standards it demanded for its own application.[275]

In the Avena case, Mexico initiated an appeal before the ICJ against US for alleged violations of Articles 5 and 36 of the Vienna Convention of 1963 on consular relations with 54 Mexican citizens sentenced to death in the US (Galbraith, 2019).[276] Mexico has proposed provisional measures against the

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in similar cases has been to do no more than offer an apology. The United States maintains that it would be contrary to basic principles of administration of justice and equality of the parties to apply against the United States alleged rules that Germany appears not to accept for itself (...)".

[275]ICJ, LaGrand (Germany v United States of America), op. cit., para. 63: "(…) the court need not decide whether this argument of the United States, if true, would result in the inadmissibility of Germany's submissions. Here the evidence adduced by the United States does not justify the conclusion of Germany's own practice fails to conform to the standards it demands from the United States in this litigation (...)".

[276]ICJ, Avena and Other Mexican Nationals (Mexico v. United States of America), op. cit.

US to take all necessary measures ensuring that every Mexican citizen is executed and without prejudice to the rights of Mexico and its citizens.

Regarding the Avena case, the US objected in a similar way as in the LaGrand case to the relevant interpretation of Art. 36 of the Vienna Convention of 1963 stating that: "(…) claim of Mexico is inadmissible in that Mexico should not be allowed to invoke against the US standards that Mexico does not follow in its own practice (…)".

The ICJ rejected the relevant objection maintaining that in practice Mexico with respect to Art. 36 was "(…) not beyond any reproach (…)" and could not constitute a basic reason for the inadmissibility of the relevant application that was presented. As expected, the clean hands doctrine was not accepted and the ICJ remained in line with the opinion that the parties despite claiming their rights the 1963 Convention has a specific character and establishes multilateral obligations which are related to the carrying out and without impediments of consular relations, which are important for international law given that: "(…) promote the development of kindly relations among nations, and ensure protection and assistance for aliens resident in the territories of other states (…)".[277]

[277]ICJ, United States Diplomatic and Consular Staff in Tehran (United States

The approach of the articles relating to diplomatic protection

The ILC also dealt with diplomatic protection which finds the clean hands doctrine[278] applicable *in partem*, given that during the preparatory work for the draft of the relevant articles it included the clean hands doctrine as a main condition for the admissibility of appeals.[279]

Alain Pellet *ab initio* was in favor of including the clean hands doctrine in the relevant articles of diplomatic protection,[280] stating

v. Iran), ICJ Reports of 24 May 1980, pp. 19-20, para. 40.

[278]See also the Provisional Summary Record of the 2793rd Meeting, U.N. Int'l L. Comm'n, 56th Sess., 3-27, U.N. Doc. A/CN.4/SR.2793 (May 14, 2004). Provisional Summary Record of the 2792nd Meeting, U.N. Int'l L. Comm'n, 56th Sess., 17-18, U.N. Doc. A/CN.4/SR.2792 (May 28, 2004); Provisional Summary Record of the 2819th Meeting, U.N. Int'l L. Comm'n, 56th Sess., 10-13, U.N. Doc. A/CN.4/SR.2819 (July 27, 2004); Provisional Summary Record of the 2791th Meeting, U.N. Int'l L. Comm'n, 56th Sess., 9-11, U.N. Doc. A/CN.4/SR.2791 (May 7, 2004).

[279]Diplomatic Protection: Titles and Texts of the Draft Articles Adopted by the Drafting Committee on First Reading, U.N. Int'l L. Comm'n, 56th Sess., U.N. Doc. A/CN.4/L.647 (2004).

[280]ILC Meeting 2793, op. cit., p. 4, which is declared that: "(…) the clean hands doctrine produced effect only in the context of diplomatic protection (…) in proceedings between states the (clean hands) doctrine was inapplicable. However, where a case involved an individual and a state via

that: "(…) was not very different from the general principle of good faith in the context of relations between states, and had no autonomous consequences and little practical effect on the general rules of international responsibility[281] (...) had no meaning in disputes between states, his point of view seems to imply that even the principle of good faith then has no application in disputes between states (Shapovalov, 2005). This position is certainly wrong because, in addition to denying the role of the principle of good faith in international law, it also assumes that diplomatic protection has nothing to do with interstate disputes (…) as it is implicit in the concept of

diplomatic protection was relevant (...)".

[281]Sixth Report, op. cit., para. 3 cited the intervention of Pellet: "(…) the vague concept of "clean hands" was not very different from the general principle of good faith in the context of relations between states, and had no autonomous consequences and little practical effect on the general rules of international responsibility (…) in the context of diplomatic protection, which involved relations between states and individuals, the concept took on new significance: it became functional, for in the absence of "clean hands" the exercise of diplomatic protection was paralyzed. If a private individual who enjoyed diplomatic protection violated either the internal law of the protecting state-and it should be noted that international law played no role at all in cases involving relations between states-or international law, then in the general context of the claim, the state called upon to exercise protection could no longer do so (...)".

diplomatic protection the idea that once a state has taken up a case on behalf of one of its subjects before an international tribunal, in the eyes of the latter the state is the sole claimant[282] (...) the damage to the state represents the basis of the current work of the ILC on diplomatic protection (…)" (Borchard, 1913). Contrary to the French jurist, was the sixth report on diplomatic protection that was expressed by the Special Rapporteur John Dugard,[283] who stated that: "(...) the draft articles did not include a provision on the clean hands doctrine, a position that, finally, adopted by the ILC[284] (…) cases make it difficult to sustain the argument that the clean hands doctrine does not apply to disputes involving direct inter-state relations[285] (…). States have frequently raised the clean hands doctrine in direct inter-state claims and in no case has the Court states that the doctrine is irrelevant to inter-state claims (…) had been invoked precisely in direct disputes between states in which the ICJ had never gone so

[282]See also the Mavrommatis Palestine Concession case (Greek v. U.K.) 1925 PCIJ (Ser. A) No. 2, 12 (Aug. 30).

[283]ILC Meeting 2791, op. cit., 10.

[284]Report of the International Law Commission, op. cit.

[285]John Dugard, Sixth Report of the International Law Commission on Diplomatic Protection, UN Int'l L. Comm'n, 57th Sess., 2, UN Doc. A/CN.4/546, 11 Aug. 2006, para. 6.

far as to dispute its existence or even its relevance (…).[286] The state of nationality (of an alien) may exercise diplomatic protection on behalf of the individual because of (an) internationally wrongful act (...) could not find application in (this) context, first of all because the complaint has now taken on the interstate character and, secondly, because the individual does not have legal personality and therefore cannot (outside the field of international criminal law) be held responsible for the violation of international law (…)".[287]

From what we have understand from Dugard's positions is that direct and indirect interstate disputes include diplomatic protection and apply the clean hands doctrine. Unlike direct disputes between states where the illicit act of a state affects the state directly against another state. This is the exercise of diplomatic protection where the state presents the relevant complaint for acts that are internationally illicit and which cause

[286]Sixth Report, op. cit., para 7.

[287]Sixth Report, op. cit., para. 8. "(…) as a consequence of the fiction that an injury to a national is an injury to the state itself, the claim on behalf of a national subjected to an internationally wrongful act becomes an international claim and the clean hands doctrine can be raised against the protecting state only for its conduct and not against the injured individual for misconduct that may have preceded the internationally wrongful act (…)".

harm to its citizens. As regards interstate disputes, the transgression of the appellant state is relevant for the purposes of evaluating the defense of the clean hands doctrine.

Contrary to diplomatic protection, transgression of the state of nationality includes the clean hands doctrine and of one's own citizen. This difference is based on the way in which the clean hands doctrine respects direct and indirect disputes between states providing the related explanation, which is applied in the first and second cases.[288]

In particular, the Special Rapporteur stated that: "(...) if a foreigner commits a crime and as a consequence is sanctioned through the deprivation of liberty or property - according to the rules of the legal system of the state in which he is found - it is unlikely that the state of nationality intervenes to help him since the state authorizing the sanction has not committed any international offense. If, however, an international offense is committed by the host state - where the individual has nevertheless always committed a crime - as a reaction to the conduct of the foreign citizen (for example torture, denial of due process, etc.), the state of citizenship can then act in diplomatic protection since an international offense exists (...) the clean hands doctrine would not apply given the international, interstate

[288]Sixth report, op. cit., para. 16.

character assumed by the dispute and since the individual is not a subject of international law (except with regard to international criminal law) (…)".[289]

For Dugard the relative function, where the violation of a citizen's right constitutes the relative violation of the state of citizenship and on behalf of the private individual, who is the victim of an international offense, becomes the claim for the clean hands doctrine and is invoked against the state of citizenship only for the conduct and against the individual where the illicit behavior prior to the commission of the offense was perpetrated by the host-state. Thus, for Dugard the clean hands doctrine does not cover an absolute space within the context of diplomatic protection. Because if the individual commits a crime that punishes the relevant law that has been violated, no international crime exists and so the doctrine is irrelevant if not non-existent.

However, if the citizen who commits an offense undergoes the relevant treatment for an international offense presents an offense against the state of nationality who is entitled to evaluate the international responsibility of the state which exercises the relevant protection.

[289]Sixth report, op. cit., para. 16.

The clean hands doctrine is also used in jurisdiction not as an obstacle to the admissibility of a related complaint but in the substantive phase, i.e. as a mitigating circumstance or exclusion of state's liability by stating that: "(...) the doctrine is applicable to relating claims to diplomatic protection it would seem that the doctrine would more appropriately be raised at the merit stage as it relates to attenuation or exoneration of responsibility rather than to admissibility (…)" (Baker, 2014).

The related report mentions the LaGrand and Avena cases which did not call the clean hands doctrine given that private individuals committed serious crimes and their respective states of nationality did not respect international standards requiring compliance by the US. There are no elements from practice that allow the affirmation of the applicability of the clean hands doctrine in cases concerning diplomatic protection[290] given that

[290]Sixth report, op. cit., para. 18. "(…) the present report has shown that the evidence in favour of the clean hands doctrine is inconclusive. Arguments premised on the doctrine are regularly raised in direct interstate cases before the International Court of Justice, but they have yet to be upheld. Whether the doctrine is applicable at all to claims involving diplomatic protection is highly questionable. There is no clear authority to support the applicability of the doctrine to cases of diplomatic protection. Such an authority as there is uncertain and of ancient vintage, dating mainly from the mid-nineteenth century-as the above cited passages from Salmon demonstrate (...)".

the relative uncertainty in this rule in relation to applicability is the introductory basis for a progressive rule.[291]

The decision of the ILC to include the clean hands doctrine in the Draft Articles on Diplomatic Protection did not have the consequence that this principle is part of international law. This decision takes into account the only conduct that is relevant when assessing the admissibility of related appeals according to international law such as that of the appellant himself.

Using Dugard's words once again: "(…) the clean hands doctrine is an important principle of international law that has to be taken into account whenever there is evidence that an applicant state has not acted in good faith and that it has come to court with unclean hands (…)".[292].

In other words, it cannot be absolutely ruled out that the application of the clean hands doctrine in the sector of diplomatic protection leaves a significant space in the substantive phase of each dispute and as a basis for a question that has a meta-legal

[291]Sixth report, op. cit., par. 19: "(…) in these circumstances the Special Rapporteur sees no reason to include a provision in the draft articles dealing with the clean hands doctrine. Such a provision would clearly not be an exercise in codification and is unwarranted as an exercise in progressive development in the light of the uncertainty relating to the very existence of the doctrine and its applicability to diplomatic protection (…)".

[292]Report of the International Law Commission, op. cit., para. 236.

nature.

Clean hands doctrine and the European Court of Human Rights (ECtHR)

Within the clean hands doctrine context, we have noticed some cases that we have to do with the jurisprudence offered by the ECtHR where the defendant states and the judges have referred with regard to the relationship between the state and a private entity.

First of all we recall the Van der Tang v. Spain[293] case where the government of Spain objected to the clean hands doctrine at the preliminary stage. In particular, the Spanish government stated that: "(...) the fact that the appellant had made himself unavailable to escape justice constituted, for him, an obstacle to invoking a remedy before the court[294] (...) It argued that clean hands doctrine in international law meant that the responsibility

[293]ECtHR, Van der Tang v. Spain, op. cit.

[294]ECtHR, Van der Tang v. Spain, op. cit., para. 49: "(…) the government reiterated their previous plea before the Commission (…) that the applicant, who had absconded in breach of the conditions attaching to his provisional release (…), was not entitled to bring a case against the very state whose justice he had evaded. (…) In the government's submission, the resultant lack of 'clean hands' prevented him from bringing the present action (…)".

of a state is not engaged when the complainant himself has acted in breach of the law, international or domestic (...) did not contest the relevance of the doctrine nor its formulation in the terms proposed by the defendant government but rejected the exception because, in the specific case, the violation by the state (excessive duration of preventive arrest, for more than three years) had occurred before the offense committed by the appellant (attempt to escape justice) (…)".[295]

As we can understand, the ECtHR did not exclude that the clean hands doctrine constituted the preliminary condition for the admissibility of the appeal of an individual nature given that its applicability arose in exposed circumstances. In particular, in the case just cited, judge Morenilla[296] "considered a causal link

[295]ECtHR, Van der Tang v. Spain, op. cit., para. 51: "(…) the Delegate of the Commission submitted that since the facts on which the substance of the complaint was based, that is pre-trial detention lasting more than three years, preceeded the applicant's flight from Spanish justice, the latter act did not affect the grounds of the alleged violation (…) the court agrees with the conclusion of the Commission and the applicant. The alleged violation of the Convention by the Spanish authorities occurred before Mr van der Tang absconded in breach of his undertakings (…) his subsequent flight, albeit wrongful, did not render illegitimate his interest in obtaining from the Convention institutions a ruling on the violation he is alleging. The government's preliminary objection must therefore be rejected (…)".

[296]See the dissenting opinion of judge Morenilla, para. 6.

between the illicit conduct of the individual and the illicit act committed by the state (criterion not satisfied in the present case)" (...) "the applicant's unlawful conduct in the instant case did not give rise to the violation he complained of or contribute to bringing about (...)".

Moving on to the Ukraine-Tyumen v. Ukraine[297] case the thesis of non-acceptance of the appeal was based on the positions of the respondent government where it considered that the violation of the law by the author for a complaint can exonerate that the author state has committed an offense having to do with the international responsibility.[298] The plaintiff did not contest a legal framework that had the dispute as its object. He was disinterested in the general context of the clean hands doctrine.[299]

[297]ECtHR, Ukraine-Tyumen v. Ukraine of 22 November 2007.

[298]ECtHR, Ukraine-Tyumen v Ukraine, op. cit., para. 34 is declared that "(…) the government (…) argued that the applicant, which had first benefited from the extraordinary review of the judgement favourable to another party to the proceedings (…), was not entitled to bring into question the compliance of the same procedure, as a result of which it had finally lost the case, with the Convention (...)".

[299]ECtHR, Ukraine-Tyumen v. Ukraine, op. cit., para. 35, "(…) the applicant disagreed, stating that the review of its case by the Review Panel had been a part of the ordinary court procedure for the purpose of Article 6 para. 1 of the Convention and had not contravened the principle of legal certainty. In contrast, the review of its case by the Plenary Court was an extraordinary

The ECtHR did not take a definitive position on the clean hands theory since it did not explicitly and expressly contest the existence of the Ukrainian exception based on a reason that was not so much acceptable but also logical.[300]

Finally in Chapman v. United Kingdom case[301] judge Bonello, through his dissenting opinion, stated that the clean hands doctrine can be a violation of a law by a subject/individual and an excusable consequence given the previous violation of the law by the relevant authority noting that: "(...) a public authority which is in breach of its legal obligations should not be allowed to plead that it is an action "in accordance with the law". The classic constitutional doctrine of "clean hands" precludes those who are in prior contravention of the law from claiming the law's protection (...)"[302].

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procedure which contravened Article 6 para. 1 of the Convention (…)".

[300]ECtHR, Ukraine-Tyumen v Ukraine, op. cit., para. 37: "(…) the Court finds that the resolution of the Review Panel of 11 March 1999 was the "final decision" in the case, within the meaning of Article 35 para. 1 of the Convention, and the court rejects the government's submission that the applicant company's application to the Review Panel disqualified it from complaining about subsequent events (...)".

[301]ECtHR, Chapman v. United Kingdom of 18 January 2001.

[302]ECtHR, Chapman v. United Kingdom and the dissenting opinion of judge Bonello, para. 5, 7: "(…) in the present case, both the public authorities and the individual had undoubtedly trespassed the boundaries of legality. But it

The issue of admissibility as a preliminary question

Up to now, we have many times noticed that the clean hands doctrine has been referred to as an argument of inadmissibility. Non-admissibility as a preliminary objection is a procedural tool that is part of international practice (Thirlway, 2006) as we have noted in the cases of the PCIJ, the ICJ, in the procedure of the Court of Justice of the EU as well as in the permanent arbitration bodies as for example we have noted in Art. 21 of the Iranian-US Claims Tribunal.

When we talk about preliminary objection we are also referring to various and different forms which are difficult to embrace them to a concrete framework. In particular, we recall the PCIJ, which defined the preliminary objection as: "(…) any objection of which the effect will be, if any objection is upheld, to interrupt further proceedings in the case and which it will therefore be appropriate for the court to deal with before inquiring into the merits (…)".[303]

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was the public authority's default in observing the law that precipitated and induced the subsequent default by the individual. That failing of the authorities has brought about a situation which almost justifies the defence of necessity (...)".

[303]PCIJ, The Panevezys-Saldutiskis Railway Case, PCIJ, 28 February 1939.

A preliminary objection has to do with a state that is party to an international proceeding. In such a case, the defendant is facing a certain question which is based on whether or not the application is well founded. It examines and resolves the proceeding on the merits as a decision thus upholding the preliminary objection as impossible. Within this context, the ICJ in the Barcelona Traction case stated that: "(…) the object of a preliminary objection is to avoid not merely a decision on, but even any discussion of the merits (…)".[304]

The preliminary objection is concretized as an objection on jurisdiction where the jurisdictional issue is dealt with in the preliminary phase given that jurisdiction in international law of a consensual nature has to do with a state that has the right to prevent the relative control of its conduct by party of the court which did not confer the relevant jurisdiction.

The constituent body of a judicial body has the objective of putting the required conditions in order given that this body exercises the relevant jurisdiction in each concrete case. The constitutive instrument is chosen and constitutes the title of jurisdiction.

[304]ICJ, Case concerning the Barcelona Traction, Light and Power Co, Ltd, op. cit.

The relevant objections to jurisdiction have as their basis the case, that is presented and which does not fall within the jurisdiction of the ICJ. It accepts from the other party the state *ratione personae* or *ratione materiae* and the temporal scope of any jurisdiction. But are preliminary objections related only to questions of jurisdiction?.[305]

The ICJ rules have already stated the: "(...) objection by the respondent to the jurisdiction of the Court or to the admissibility of the application, or other objection the decision upon which is requested before any further proceedings on merits (…)".[306]

Objections to admissibility are considered to be objections which are framed by the nationality of the parties[307] and which are linked to the relative exhaustion of national remedies.[308]

The ICJ regarding admissibility states that: "(…) objections to admissibility normally take the form of an assertion that, even if the court has jurisdiction and the facts stated by the applicant state are assumed to be correct, nevertheless there are reasons why the court should not proceed to an examination of the merits

[305]The Panevezys-Saldutiskis Railway case, op. cit.

[306]Art. 79 (1) ICJ Rules.

[307]ICJ, South West Africa (Ethiopia v. South Africa; Liberia v. South Africa), preliminary objections, 18 July 1966, I.C.J. Rep 1966.

[308]ICJ, Barcelona Traction Light and Power Company, Limited (Belgium v. Spain) (New Application: 1962), (second phase), op. cit.

(…)".[309]

It is clear how admissibility can import an element of discretion which must be exercised strictly in accordance with the legal criteria, taking into account the place of judicial resolution of international disputes in the conduct of international affairs, the way in which an international tribunal operates, and how it obtains its authority to decide a case.[310]

What is the distinction between admissibility and jurisdiction? Trying to qualify the issue that is relevant to the jurisdiction involves rules that are predetermined leaving the relative control to the parties (Shany, 2016).

The issues of jurisdiction confer the decision-making power of the court itself. Where pre-conditions such as experimenting with alternative remedies is not a matter which satisfies any court that it has the power/duty to adjudicate. By satisfying the conditions for the jurisdiction of the court you do not refuse to make the relevant judgment own. A qualification of admissibility thus allows the court a certain margin of discretion and that it is not a duty/power to decide but a precise and clear power (Hohfeld, 1913).

[309]ICJ, Oil Platforms (Islamic Republic of Iran v. United States of America), op. cit., para. 29.

[310]ICJ, Oil Platforms (Islamic Republic of Iran v. United States of America), op. cit., para. 30.

The jurisdiction thus addresses the relevant issue where the judicial authority that is seized accepts and renders a decision as binding on the parties, a concept that is strictly legal and true. This means, that the term of admissibility has a close relationship with the relevant jurisdiction (Rosenne, 2006).

The objection to admissibility is independent of whether the court has jurisdiction or not. There are other reasons where the court can refuse to accept the relevant case. The ICJ, thus, distinguished the issues of jurisdiction and admissibility by stating that the decision that was taken in the case of the oil rig had to do with: "(...) the form of an assertion that, even if the court has jurisdiction and the facts stated by the applicant state are assumed to be correct, nevertheless there are reasons why the court should not proceed to an examination of the merits (…)" (Shapovalov, 2005).

The clean hands doctrine is not a preliminary question of admissibility but a defense that addresses the relevant cause (Shapovalov, 2005). In some defense briefs, the states have referred to the clean hands doctrine as an argument regarding the admissibility or otherwise of the case and in the phase of examination of the merits. It is therefore a procedural principle based on and which ascertains the case and examines the facts of the case (Shapovalov, 2005).

Addressing the objection in the substantive phase we can understand that the aspects of the clean hands defense has a full knowledge of the facts and that they are correlated and that they respect the relative ratio that the judging panel focuses on, i.e. the relative actions of one on the party (Lautrpacht, 1957).[311]

If perhaps otherwise, the clean hands doctrine is a preliminary issue where the risk of knowledge of the facts does not allow the relative balancing of the parties' conduct. Especially in the merits phase, the clean hands doctrine serves to mitigate the relative compensation which is in favor of the plaintiff as an illicit conduct.

The clean hands doctrine is also connected with *bona fide*, as a general principle of substantive law and as a rule that prohibits benefiting from one's illicit conduct by considering it as a general principle of law (Crawford, 2019).[312] In particular, written and oral submissions by some states before international tribunals give the impression that parties seek to use the term clean hands as an argument that specifies or replaces *bona fide* (Kolb, 2017).[313] And we say this given that *bona fide* is a general

[311]See the Pajzs, Csàky Esterhàzy (Estonia v. Lithuania), PCIJ Rep Series A/B No. 76, 16 December 1936.

[312]Legal Status of the Eastern Greenland (Denmark v. Norway) and Diversion of Water from the River Meuse (Netherlands v. Belgium), op. cit.

[313]ECtHR, Van Der Tang v. Spain, op. cit., par. 363.

principle of law and that it is evaluated by the courts in the merits phase where the behaviors are fairly balanced and evaluated on the basis of full knowledge of the facts of the case (Shapovalov, 2005; Lis, 2016). Thus, we proceed and also address the defense of clean hands doctrine as we have noted in the logic of the ICJ in the oil platforms' case.[314]

Even in the Counter-Memorial and Counter-Claim that was filed by the United States on 23 June 1997 the United States presented the clean hands doctrine as a preliminary objection. The Court rejected the position of the US and emphasized that the clean hands doctrine was considered to be at the merits stage.

The interpretation used was the result in terms of equity where the clean hands doctrine is applied in the merits phase and which adequately allows for positions where the parties have avoided the arguments that are presented in a specious manner.

Nullus commodum capere de sua injuria propria (no advantage (may be) gained from one's own wrong)

Speaking of no advantage (may be) gained from one's own wrong (Cheng, 1987) means to recall the related principle which was used for the first time by the jurisprudence of the PCIJ in the

[314]ICJ, Case Concerning Oil Platform (Islamic Republic of Iran v. United States of America), op. cit.

Factory at Chorzòw case.[315] Poland was of the opinion that the PCIJ did not have the relevant jurisdiction to resolve the relevant dispute since the aggrieved German companies had to turn to the bilateral treaty between Poland and Germany.[316]

The PCIJ rejected the Polish positions stating that the: "(…) principle generally accepted in the jurisprudence of international arbitration, as well as by municipal courts, (is) that one party cannot avail himself of the fact that the other has not fulfilled some obligation or has not had recourse to some means of redress, if the former party has, by some illegal act, prevented the latter from fulfilling the obligation in question, or from having recourse to the tribunal which would have been open to him (…)".[317]

In the Temple of Preah Vihear[318] case, the Vice President, Ricardo Joaquin Alfaro, observed in relation to the topic that: "(...) according to the principle of estoppel (Tams, 2010), a state, under

[315]ICJ, Certain German Interests in Polish Upper Silesia (Germany v. Poland), Preliminary Objections, PCIJ Rep, Ser A, No 6, 1925, para. 8–10.

[316]PCIJ, Factory at Chorzòw case (Federal Republic of Germany v. Poland), op. cit., para. 25.

[317]PCIJ, Jurisdiction of the Courts of Danzig, (1928) PCIJ Rep (Ser B, No 15) para. 26-27.

[318]ICJ, Temple of Preah Vihear (Cambodia v. Thailand), op. cit., Separate Opinion of judge Fitzmaurice, 62–64.

certain circumstances, cannot take advantage of inconsistency in its conduct to the detriment of another state (...) *a fortiori*, a state should not be allowed to reap the fruits of its wrongful actions when another state is deprived, by reason of such conduct, of its right or ability exercise his right (…)".[319]

The principle *nullus commodum capere de sua injuria proprio* can be found in the jurisprudence of the Iranian-US ad hoc Tribunal[320] as well as in the International Center for Settlement of Investment Disputes (Moloo, 2010; Schwebel, 2013).[321] A principle well proposed by modern international law that demonstrates not only the relative actions foreseen by the actor but also the sole cause for the violation committed by the defendant.

In the case of humanitarian interventions, the intervening state acts in deciding and defending the use of armed force and the rights of the people of the attacked state. Even this type of

[319]ICJ, Temple of Preah Vihear (Cambodia v. Thailand), op. cit., Separate Opinion of vice-President Alfaro, para. 40.

[320]See also the Tippets, Abbet, McCarthy, Stratton v. TAMS-AFFA case (1984) 6 Iran-US Cl Trib, Rep 219, para. 224–227.

[321]Inceysa Vallisoletana SL v. El Salvador, ICSID case No ARB/03/26, Award (2006), par. 244: "(…) no legal system based on rational grounds allows the party that committed a chain of clearly illegal acts to benefit from them (…)".

manifestation, the clean hands doctrine does not take on significant importance in the sector of humanitarian interventions.

***Ex delicto non oritur actio* (an unlawful act cannot serve as the basis of an action in law)**

According to this position, the unlawful act cannot serve as the basis of an action in law[322] because it is similar to that of the *nullus commodum capere de sua injuria proprio* (Cheng, 1987) with the difference that the latter is made on the claim of the applicant, which is influenced by illegality, i.e. by the right of the applicant, who directly requests the illegality committed by the applicant.

This position was used by judge Anzilotti in the Eastern Greenland[323] case. He took considered illegal the relevant Norwegian position in relation to the principle of sovereignty in the territory of Eastern Greenland as it contradicted in the previous commitment with Denmark[324] precluding that Norway

[322]PCIJ, Legal Status of Eastern Greenland (Denmark v. Norway), dissenting Opinion of judge Anzilotti, op. cit., para. 95.

[323]PCIJ, Legal Status of Eastern Greenland (Denmark v. Norway), op. cit., par. 39.

[324]PCIJ, Legal Status of Eastern Greenland (Denmark v. Norway), dissenting

did not have the possibility to obtain a declaration from the court. So the occupation exercised by their government was legitimate and valid (Alford, 2000).[325] Regarding the area of human rights and humanitarian interventions, the complainant after the related complaint for an illicit humanitarian intervention noted some distinct actions.

Opinion of judge Anzilotti, op. cit, par. 94.

[325]PCIJ, Legal Status of Eastern Greenland (Denmark v. Norway), dissenting Opinion of judge Anzilotti, op. cit, para. 95. Free Zones of Upper Savoy and the District of Gex (Second Phase) (France v. Switzerland), Order (1930) PCIJ Rep Ser A, No 24, para. 16. The PCIJ: "(…) decreed that France was prohibited from relying on the consequences of its wrongful act when the states had to decide on the appropriate regime in the light of "present conditions". An application of the *ex delicto non oritur actio* principle is found in the UN Compensation Commission Governing Council, Report and Recommendations Made by the Panel of Commissioners Concerning the First Installation of "E2" Claims, 3 July 1998, UN Doc S/AC.26/ 1998/7, para 170 (First Installation of "E2" Claims) which dealt with the question of whether to provide compensation to claimants for work performed despite the trade embargo against Iraq during the first Gulf War (…) it appears that the UNCC actually used the principle *ex delicto non oritur actio* (...) in considering that reparation should be denied for acts that violated the law (notably a Security Council Resolution). Therefore, the UNCC has also admitted that the *ex delicto non oritur actio* principle is applicable in briefs before international dispute settlement mechanisms (…)".

The intervening state is not part of its action committed for human rights violations even if the relevant causal link exists. This type of demonstration is relevant to prevent the relevant responsibility of the intervening state (Liakopoulos, 2020b).

Provocation

As a type of manifestation in the relevant causal link, the responsibility of a state also refers to its own alleged illicit acts, which are caused by the illegality of the applicant. The difference from the *nullus commodum capere de sua injuria proprio* is that the illegality of the defendant's act is not a result of a direct nature to the illegality presented by the appellant.

The defendant's conduct is influenced by the plaintiff's illegality. Unlike the principle of *ex delicto non oritur actio*, the applicant seeks the relative recognition of his own right, as we noted in the Tehran hostages[326] case, where Iran claimed, in a brief to the ICJ a: "(…) continuous interference (...) in the internal affairs of Iran, the shameless exploitation of our country, and numerous crimes perpetrated against the Iranian people (…)".[327]

[326]ICJ, United States Diplomatic and Consular Staff in Teheran, op. cit.

[327]ICJ, United States Diplomatic and Consular Staff in Teheran, op. cit., par. 10.

The alleged US wrongdoings did not justify the illegalities committed by Iran to the detriment of diplomatic and consular rights from the US given that the convention provided for the relevant remedies to resolve the problems reported by Iran. Thus the ICJ rejected the idea that responsibility for Iran could be excluded based on the acceptance of the United States in the territory of the Shah, who refused to extradite him.[328]

According to the dissenting opinion of judge Tarazi: "(…) Iran's accusations did not negate its violations (…)".[329] Iranian accusations of US intervention in Iran's internal affairs – presumably illegal under Iranian law – were well founded (pars. 61-62). They should be placed in balance when the responsibility incurred by the Iranian government falls to be weighed. The United States were at fault regarding the disorders directed against it since they had allowed the accession to the Shah in full knowledge of its potential repercussions - thus constituting a further element to be considered in the evaluation of Iranian responsibility.[330]

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[328]ICJ, United States Diplomatic and Consular Staff in Teheran, op. cit., para. 88-89.

[329]ICJ, United States Diplomatic and Consular Staff in Teheran, op. cit., Dissenting Opinion of judge Tarazi, para. 62.

[330]ICJ, United States Diplomatic and Consular Staff in Teheran, op. cit., parr. 6, 62-63.

In fact, from the words of the judge Tarazi we have not seen an explicit reference to the clean hands doctrine, just as we have seen the same line of thought from judge Scwebel in the Nicaragua case who took into consideration a similar principle.[331].

The ICJ has not consider the clean hands doctrine as a provocation in relation to the Gabčíkovo-Nagymaros project, despite the fact that it was the basis and presuppositions for doing so.[332]

In the field of humanitarian intervention, the acceptance that the intervening state acted according to real humanitarian intentions, is caused by serious violations of human rights by the attacked state.

Finally, we recall that in the advisory opinion regarding the construction of the wall in the occupied Palestinian territories, Israel was of the opinion that the construction of a "security barrier" was created by Palestinian terrorism and the ICJ did not

[331]ICJ, Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Dissenting Opinion of judge Schwebel, op. cit., para. 270.

[332]ICJ, Gabčíkovo-Nagymaros Project (Hungary v. Slovakia), op. cit., "(…) its basic right to an equitable and reasonable sharing of the resources of an international watercourse (…)".

refuse to exercise the relevant jurisdiction.[333]
The ICJ stated that the clean hands doctrine is irrelevant and the entity that requested the advisory opinion was the work of the General Assembly of the United Nations and not of Palestine which was the target for the charges of lawlessness[334].

Subject of disputes and illicit actions

According to the clean hands doctrine, some parties to a dispute may have acted inappropriately and reacted illicitly in relation to their subject of the dispute, thus preventing them from reaching not only the conclusion of the dispute but also from asserting their rights.
This position is used and affirmed by judge Morozov in the Tehran hostages[335] case where it was stated that: "(...) before the appeal to the ICJ and following the indication of provisional

[333]Letter dated 29 January 2004 from the Deputy Director General and Legal Advisor of the Ministry of Foreign Affairs, together with the Written Statement of the Government of Israel, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, op. cit., para. 9.3-9.4.
[334]ICJ, Legal consequences of the construction of a wall in the occupied Palestinian territory, op. cit., par. 64.
[335]ICJ, Teheran Hostages, op. cit., Dissenting Opinion of judge Morozov, par. 53.

measures by the latter, the United States had imposed sanctions unilateral measures against Iran, among other things, by freezing Iranian accounts in the United States (...) while the Court was about to decide on the merits of the case (...), the United States had undertaken a military operation (which failed) to rescue its personnel detained in Iran, invoking as justifications the humanitarian well-being of its citizens and the right of self-defense under the United Nations Charter (…) sharply criticized the US military incursion, noting that it was contrary to its direct order to both states not to contribute to worsening the situation (...) declared that the incursion "can have no bearing on the evaluation of the conduct of the Iranian government over six months earlier (...) which is the subject-matter of the United States application (…). The ICJ noted that questions relating to the lawfulness of the transaction and the potential consequences of an unlawful act had not been raised before the Court (…) declaring its intention to settle the dispute between the United States of America and the Islamic Republic of Iran exclusively by peaceful means, and presenting its Application to the Court, the applicant in fact simultaneously acted contrary to its own declaration, and committed a series of grave violations of the provisions of general international law and the Charter of the

United Nations[336] (…) forfeit the legal right as well as the moral right to expect the Court to uphold any claim for reparation (…)".[337]

Of the same line of thought is opinion of judge Weeramantry, who applied the clean hands doctrine in the Legality of the use of force case (pars. 54-55), stating that: "(…) is patently clear (...) that it is a precondition to the granting of any relief to the applicant if the latter is engaged on a course of violence relevant to the subject-matter of the application, that violence should immediately cease (…)".[338]

It is understood that this was a problem which left the resolution of disputes at a stage which is not reached due to the lack of relevant jurisdiction.[339]

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[336]ICJ, Teheran Hostages, op. cit., Dissenting Opinion of judge Morozov, par. 54.

[337]ICJ, Teheran Hostages, op. cit., Dissenting Opinion of judge Morozov, parr. 30, 31, 32, 92, 53, 54, 55.

[338]ICJ, Case concerning legality of use of force (Yugoslavia v. Belgium), request for the indication of provisional measures, order of 2 June 1999, dissenting opinion of judge Kreca and of vice-President Weeramantry, para. 49 and 184.

[339]ICJ, Legality of Use of Force (Serbia and Montenegro v. Canada), op. cit., par. 155.

The clean hands doctrine as a principle of international procedural law

From the previous paragraphs we can understand that the clean hands doctrine is part of the general principles of law within the activities of international tribunals (Brown, 2009).

According to the opinion of Kolb, inspired by the Jay arbitration and by a complex body of jurisprudence that has been grown and recognized as a series of rules and general principles on the arbitral or judicial management of disputes (Kolb, 2006), the general principles had a procedural character that respects legal rules. Principles of law considered as a general proposition, expressive in the ratio and in the series of more concrete rules (Kolb, 1999). Thus, the principles have a "constitutional" character to a certain legal system which expresses an important and general value and a distinctive sign in relation to various questions of law.

This is an important and even unlimited basis of legal reality covered without specifying the conditions used to apply its legal effects (Kolb, 2006).

Rules are distinguished from principles since they are not contained within the limits they pre-establish and take on

functions that are different from the legal system. Principles play an important role towards facilitating the application of the law in a given case and have a kind of equitable function. As a simple rule of law that has a similar role in nature and not of "constitutional" rank.

The term principle includes the means that are necessary for the application of the rules of substantive law and the rules that determine the competence and functioning of the judicial bodies that achieve this objective.

Procedural principles are also used in the jurisprudence of the ICJ in various categories (Schwarzenberger, 1957).[340] We recall the cases of the structural and constitutional principles that are part of the equality of the parties which include the principle *audiatur et alter pars* and/or the principle of the correct administration of justice.

Within this context, the procedural principles *strictu sensu* were understood, i.e. these which concern the relative division of tasks that have to do between the parties and the court.

In practice, they try to arrange who should do what and who does what. We recall the principles that have to do with the burden of proof, the *iura novit curia* principle, the *ne ultra petita* principle

[340]"(…) individual parties to cases before the court have but a limited choice: they may take the Statute as they find it or leave it (...)".

and the free evaluation of the evidence by the judge. A final category is the substantive principles that are relevant to each proceeding which concern both the sentences of the ICJ as well as the principle of *res judicata* and the duty indicating the reasons on which the decisions are based. The substantive principles of general international law are also applicable to procedural aspects.

These principles have to do with the description and behavior that is expected from the parties. They are principles based on the principle of loyalty between the parties which include the prohibition of abuse of process, estoppel and the *nemo commodum capere potest de sua proprio injuria* (Robertson, 2020). These are principles that come from the general principle of *bona fide* where the parties are inspired by each other and undertake judicial proceedings.

We do not forget that the substantive principles that are part of the judicial action take on a procedural character. Within this context comes the clean hands doctrine.

The *bona fide* imposed on both parties not to undertake other actions that may negatively influence the correct functioning of the procedure also finds a precise basis. This basis specifies the prohibition of abuse of the process and applies in estoppel the procedural type and the principle of *nemo commodum capere*

potest de sua proprio turpitude (Kolb, 2006).

It is essential that one party not be allowed to reap the benefits of related misconduct. It is an illicit act that takes the form of conduct that is proven in a moral way, leading to simple negligence (Kaijun, 2017).

A state cannot raise an objection that amounts to non-execution of one of its international obligations.

Procedural rules do not have to do with whether or not conduct is lawful in resolving a dispute (Bastin, 2012).[341] Parties in disputes call procedural rules that prevent a court from applying substantive rules that are involved with the violations that are made (Talmon, 2012).

Within this context, falls the clean hands doctrine which prevents a court from accepting the position that a party involved in illicit conduct is connected to the dispute. It is very difficult to distinguish this connotaiton from the substantive rule since the clean hands doctrine is a procedural rule (Crawford, 2019). Its applicability does not concern the illegitimacy of the act which is part of and which the appellant has in his hands but concerns the illegitimacy of a different act which is connected, committed by the same appellant.

[341]ICJ, Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), op. cit., para. 93.

The clean hands doctrine is a procedural rule that is examined in connection with procedural and substantive rules that are part of the family of international law.

The link between substantive and procedural rules is the subject of examination in modern international law.[342] These are called procedural rules preventing a court from monitoring and examining the violation of a substantive rule. This is how the discussion of the hierarchy of international law norms arises (De Wete, 2006). Procedural rules have the objective of determining, according to international law, the applicability of substantive law, i.e. the balance between substantive and procedural rules that "override" these of a procedural nature (Zimmermann, Tomuschat, Ellers-Frahm, 2006)[343].

[342]ICJ, East Timor (Portugal v. Australia), Judgment [1995] ICJ Rep 90, para. 29. Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), op. cit., para. 60; Legality of Use of Force (Serbia and Montenegro v. Germany), Preliminary Objections, Judgment [2004] ICJ Rep 720, para. 39. Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Rwanda), Jurisdiction and Admissibility, 3 February 2006, I.C.J. Rep. 2006, para. 64. Pulp Mills on the River Uruguay (Argentina v. Uruguay), Judgment [2010] ICJ Rep 14, para. 67 and 158.

[343] ICJ Statute: art. 25(1) and (3), 41; ICJ Rules (n 90) adopted on April 1978 and enter into force 1st July 1978, art. 74(2)–(3).

It is surprising that the nature of the substantive rules are *jus cogens* norms and this type of norms are: "(...) interests transcending those of individual states, having a moral or humanitarian connotation (...) because (their) violation would involve a result so morally deplorable as to be considered absolutely unacceptable by the international community as a whole (…)" (Orakhelashvili, 2006).

Some exceptions to the *jus cogens* norms, which are part of other norms of international law which do not have the same status,[344] are not permitted. The persistence of procedural rules is based on the facts that international law, unlike national systems, lacks any form of central government. The separation of substantive rules has to do with its own enforceability (Rau, 2002; Bartsch, Elberling, 2003).

Procedural rules are distinguished from rules of domestic law since procedural rules are based on the judgment of international law. In sum, procedural rules aim to clarify the rules that are used for acceptance as well as to allow the related dispute resolution mechanism to develop (Pomson., Horowitz, 2015).

[344]Vienna Convention on the Law of the Treaties, op. cit., artt. 53, 64; Articles on Responsibility of States-Commentary to Article 26, para 5.

Final observations and outlook

From what we have seen so far is that doctrine and jurisprudence do not follow a single and precise path regarding the clean hands doctrine.

In particular, the doctrine has found various interpretative spaces based on the defenses that are presented by the defendants in the proceedings before the ICJ, also influencing the briefs of the opposing parties and the dissenting opinions of the judges through the final decisions. From the cases we have mentioned so far the ICJ has not always ruled in favor of the defendant so the exercise of the clean hands doctrine still remains a topic of discussion but it has been clarified that this doctrine remains among the preliminary exceptions to exclude the admissibility of the appeal introduced.

As regards direct interstate disputes, the recall of disputes where they have caused indirect damage to the state violates citizens' rights. The primary and secondary sources were suitable to give explanations in the clean hands doctrine with reference to diplomatic protection which clarified the comments proposed by the various doctrines.

There were many questions and topics under discussion. What are the objectives that are called for by the relevant rules such as the state of nationality or of the individual or of both? Is the

violation, the conduct for international responsibility of any or specific type? What is the role of the host state in domestic law? What is the individual's citizenship status? What are the effects of the rule based on the cause of inadmissibility or the mitigating factors, the exemptions for the responsibility of the host state?

International protection played an important role in the evolution of the investigation for clean hands as an exception in the preliminary phase of inadmissibility, especially in interstate disputes where the *fictio iuris* for the violation of a citizen's rights was understood as a violation of the state of nationality.

The unclean hands of the private individual is subject of evaluation by the ICJ. The private individual cannot act as the author of an international offense through the conduct of the private individual towards the state of nationality.

A position that was also accepted by the ILC without meaning that the principle is not part of international law. This decision clarifies that the relevant conduct for the purposes of assessing the admissibility of claims under international law is the basis for the appellant state.

The Special Rapporteur Dugard stated, in this regard, that: “(…) the clean hands doctrine is an important principle of international law that has to be taken into account whenever there is evidence that an applicant state has not acted in good faith and that it has

come to court with unclear hands (…)".[345] It is the state conduct that assumes the relevant application in the investigation in question.

It is understood that the clean hands doctrine is part of the procedural principles of international law which lends itself to covering a wide circle of situations which plays a role in the substantive phase for the administration of justice and the behavior of the legitimacy of the conduct to determine and avoid the possible damage. The practice that he proposes to conclude the clean hands doctrine forms in a desirable way the promotion of a "rule" that is developing. The clean hands doctrine in procedural law provides the basis and use for the ICJ but also for other international bodies that are not necessarily similar.

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[345]Report of the International Law Commission, op. cit., para. 236.

other international bodies that are not necessarily similar.

In the Anglo-Saxon common law system, the clean hands doctrine has found its basis on the equity system. In civil law systems it reaches a similar outcome based on the *bona fide* and on procedural level on the *exceptio doli generalis*. Equity distances itself from the Anglo-American tradition. It has assumed an important role in general international law among the general principles that are part of the sources of the ICJ according to Art. 38 of the Statute of the ICJ (Pellet, 2014). Trying to find a compromise solution to satisfy the needs of both common and civil law traditions we are based on general principles that allow us to evaluate the relevant concept under examination in an indefinite way.

The ICJ took for granted the various fair rules such as estoppel and the principle of clean hands doctrine which are part of international law and which do not require other explanations for the statement, according to the definitional purposes under examination.

The principle of legal logic takes on an important meaning according to Art. 38 of the Statute of the ICC (Pellet, 2016), shared in most legal systems at national level. The doctrine found its basis on the Roman tradition and above all on the maxims *nullus commodum capere de sua iniuria proprio*, *ex dolo malo*

non oritur actio and *inadimplenti non est adimplendum*. Maxims that we have also seen in jurisprudence, to the general principles that also formed the basis of the clean hands doctrine. In the continental legal tradition, *bona fide* plays a very important role, constituting the tool that remedies malicious and fraudulent behavior causing damage to the contractual counterparty.

The *exceptio doli* shows that the procedural faculty opposes the request even in an abstract way and concretely expresses the malicious or incorrect exercise of a right which is aimed at realizing the related interests, which are not worthy of protection by the legal system.

The exception *doli generalis* in civil law systems as well as the clean hands doctrine plays a role in equity preserving the prohibition of *contra factum proprio*. The clean hands doctrine is oriented towards the general principles of international procedural law as a defense in international disputes between states and to those of arbitration which are also contrast in cases of investments with a foreign investor in the so-called host state.

In finis, we can say that the clean hands doctrine is a type of useful defense in the hands of the defendant states both in interstate disputes and in those that oppose them even in cases of a foreign investor to avoid illicit and immoral conduct that is based on the counterparty that operates especially in the

substantive phase a balance that is fair for the actions that are part of the international proceedings.

The clean hands doctrine is a procedural principle that allows the parties to clearly call and “promote” fair, just solutions as behaviors that are part of the development and progress of international relations to curb illicit and immoral behaviors that we have noticed in the doctrinal and jurisprudential history of contemporary international law.

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Gottlieb Karr: International arbitration, foreign investments and clean hands doctrine

Part II

International arbitration, foreign investments and clean hands doctrine

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Introduction

In recent years, continuous increases in investments are a reality at European and global level (Moses, 2012).[1] Foreign investors are interested in safe host countries developing a dispute resolution mechanism with a judicial system that avoids having an unfair result for both the host state and the state that is in dispute (Heiskanen, 2008; Llamazon, Sinclair, 2015).[2] The

[1]The UNCTAD World Investment Report 2018, p. 2: https://unctad.org/en/PublicationsLibrary/wir2018_overview_en.pdf Accessed on 15.12.2024

[2]According to Heiskanen: "(…) must distinguish between: (a) the law governing the arbitration agreement; (b) the law governing the arbitral

conduct of a certain investment has as its objective the resolution of disputes from international investment arbitration. It is a system born to depoliticize investor-state disputes as well as protect foreign investments. International investment arbitration has perceived in favor of investors and has taken into account the unlawful acts subject of arbitral tribunals in a balanced way for the disputes of the defendant states not distant for the investors who are mostly winners.

Within this context, we recall in the South-West Africa case the dissenting opinion of judge McNair who stated: "(…) general principles of law recognized by civilized nations' under Article 38(1)(c) of the ICJ Statute (Alland, 2021) cannot be considered "lock, stock and barrel" as qualified in national legal systems (Weil, 1992; Liakopoulos, 2020b)[3] (…) who comes into equity must come with clean hands[4] (…) widespread in both common

proceedings; (c) the law governing the arbitral tribunal; (d) the law governing the merits of the claim, or the subject matter of the dispute; and (e) the law governing the recognition, enforcement and execution of the award (…)".

[3]International Status of South-West Africa, advisory opinion of 11 July 1950, Separate Opinion di Sir Arnold McNair (1950) I.C.J. Rep. 1950, p. 148.

[4]The term of the clean hands doctrine comes from statements and Roman tradition such as: *ex delicto non orituractio*, *nemo ex suo delicto meliorem suam conditionem facit*, *ex turpi causa non oritur*, *inadimplenti non est*

law and civil law legal systems (Pomeroy, 1941),[5]produces the effect of "blocking" the claim, given the illegal conduct carried out by the plaintiff in relation to his own claims (…) (Martin, 1994; Mitchell Sornarajam, Voon, 2015)[6] the rationale behind the "unclean hands" exception (Sander, Stein, Buckley, 2023), frequently invoked therein by the defendant states, refers in particular to the consideration that the legitimacy of the investment is a necessary condition for the arbitral tribunal to be able to grant the compensation requested for alleged unlawful acts perpetrated by the host state to the detriment of the investor (Douglas, 2014) (…) this context should not mean, unlike what currently appears to be the majority view, that states have an unlimited right to avoid the dispute *sic et simpliciter* by reason of the unlawful conduct carried out by the investor (…)" (Douglas, 2014).

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adimplendum and nullus commodum capere potest de in juria sua proprio. Therefore, what is used in today's jurisprudence and doctrine is also unclean hands and dirty hands.

[5]"(…) clean hands doctrine is a universal rule guiding and regulating the action of equity courts in the interposition on behalf of suitors for any and every purpose and in their administration of any and every species of relief (…)".

[6]According to Martin: "(…) a person who makes a claim in equity must be free from any taint of fraud with respect to that claim. For example, a person seeking to enforce an agreement must not himself be in breach of it (…)".

As a basic topic of this investigation is arbitration court's terms dealing with the investment dispute that contaminates the unlawful act, i.e. the unclean hands that are perpetrated by the investor. An investor who guarantees and develops his business to a foreign country animates and guarantees his investment. He puts in place the actions of the investor who has violated the obligations arising from a Bilateral Investment Treaty (BIT) that is in force through the host state and the country of origin of the investor.

When the investor has before an international arbitration court an unfair and inequitable treatment for the expropriation of the investment the host state raises the defense of the investor. He does not allow the claims that present a judgment of unclean hands (Kałduński, 2015) that violates the establishment of the investment.

The clean hands doctrine presents itself as an exception in the hands of the host states and in the arguing that the states parties to the dispute in international investment arbitration require investors (Kreindler, 2010; Lamm, Pham and others, 2010; Moloo, 2011; Dumbweey, Dumas-Aubin, 2013).

The enforced right of the investor where the respondent state uses the arguments that are available to avoid its liability

determines the obligation to provide the relevant compensation.[7] The clean hands doctrine demonstrates that as an applicable defense that is accepted by arbitral tribunals invokes the punished hands, the prejudicial phase of the dispute that the courts declare the legal basis of jurisdiction (Shany, 2016)[8] of inadmissibility thereby giving value to the clean hands defense. It serves as a mechanism that limits the compensation in favor of the investor.[9] The single illicit activity of the investor thus leads to international protection (Douglas, 2014) where the acceptance

[7]Mytilineos Holdings SA v. Serbia and Montenegro and Serbia, UNCITRAL, Partial Award on Jurisdiction, 8 September 2006; Perestroika Sailing Maritime Services Gmbh and Others v. Ukraine, ICSID Case No. ARB/8/08, Jurisdiciton, decision, 8 March 2010; Tokios Tokelés v. Ukraine, ICSID Case No. ARB/02/18, jurisdiction, decision 29 April 2004; Incesya Vallesoletana S.L. v. Republic of El Salvador, ICSID Case No. ARB/03/26, award, 2 August 2006, para. 240. Phoenix Action Ltd. v Czech Republic, ICSID Case No. ARB/06/05 (Stern, Bucher and Fernández Armesto), award 15 April 2009; Fraport AG Frankfurt Airport Services Worldwide v. Philippines, ICSID Case No. ARB/03/25, award, 16 August 2007.

[8]Plama Consortium Limited v. Republic of Bulgaria, ICSID Case No. ARB/03/24, 27 August 2008, para. 568-590. World Duty Free Company Ltd. v. Republic of Kenya, ICSID Case No. ARB/00/7, 4 October 2006, para. 179-187.

[9]Hulley Enterprises (Cyprus) Limited, Yukos Universal Limited (Isle of Man) and Veteran Petroleum Limited (Cyprus) v. Russian Federation, PCA Case Nos. AA226-228, award 18 July 2014, para. 435, 436, 492.

scenarios of the clean hands doctrine find application to the investor that involves acts that have to do with corruption, fraud, false declaration and deliberate violations for the rules that have to do with the host state (Losco, 2013-2014).

Investment dispute resolution through arbitration is not defined in the clean hands defense. It demonstrates and convinces the court that the investor does not obtain international protection (Amerasinghe, 2008; Mollo, 2011).[10]

Courts have considered as a one-way street the actions of investors who forget the relevant involvement as well as the silence of the host state in the relevant acts that constitute wrongdoing. The host state is thus implicated and allows an unlawful conduct that translates into a sufficient legal ground for the application of clean hands in the preliminary phase of the dispute.

The arbitration approach is consistent with the clean hands within the spirit of international investment arbitration which suggests an alternative approach that respects its application in practice. Thus arbitrators address the unclean hands in the preliminary phase of the dispute in question. It deals with jurisdiction and admissibility which shows that arbitrators consider the defense in

[10]World Duty Free Company Ltd. v. The Republic of Kenya, op. cit., para. 180-181: "(…) an investor who has been involved in corruption should not be able to access international protection (…)".

the phase that allows to balance the investor's behavior. The traditional approach is accepted in the defense of the clean hands of host states. It evades the liability that contributes to the realization of an unlawful act.

The investor remains in acquiescence in the physiological phase by the investor as a pathological phase of an arbitrator where the defense leads with fair way the needs of a judicial system that is overall to a conduct mixed by unclean hands thus legitimizing principles of equity that urge courts to go out of their discretion to arrive at a fair and equitable result (Brownlie, 2019).

Trying to define investment

International Investment Agreements (IIAs) (Fecak, 2016) related to foreign investments are represented in the so-called Bilateral Investment Treaties (BITs).[11] They also include multilateral agreements such as NAFTA (Tucker, 1998; Balcerzak, 2023)[12] and/or the ECT (Tanzi, 2014).[13] The ILAs present many

[11]UNCTAD, Recent Trends in IIAs and ISDS, IIA Issue Note No. 1, 2015 (UNCTAD/WEB/DIAE/PBC/2015/1), 19 February 2015.

[12]North American Free Trade Agreement (NAFTA), United States-Canada-Mexico, signed 17 December 1992 (entered into force 1 January 1994).

[13]Energy Charter Treaty (ECT), Lisbon, signed on 17 December 1994 (entered into force on 16 April 1998).

similarities. Traditional are the agreements that are constituted by reducing the substantive and procedural provisions of considerable generality.

The ILAs thus establish substantive rules that protect investors in a contracting state and in the territory of another one. These are rules that are intended to protect investors of a contracting state in the territory of another state, namely the host state, which contains procedural clauses on the arbitration of disputes and in the interpretation and application between the contracting parties (Fecak, 2016; Abi-Saab, Keith, Marleau, Marquet, 2019). Investments determine and establish the jurisdiction *ratione materiae*.[14]

Art. 25 of the ICSID Convention contemplates jurisdictional objectives and provides in this regard that: "(...) jurisdiction of the Center shall extend to any legal dispute arising directly out of investment (…) the jurisdiction of an ICSID tribunal can be established only if the dispute has as its object an investment, the ICSID Convention does not contain its own definition of the term

[14]According to Art. 25(1) of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention), stopped in Washington on 18 March 1965, (entered into force on 14 October 1996) is affirmed that in the legal dispute the Center has jurisdiction can be summarized in: (i) existence of a legal dispute and (ii) existence of an investment.

(…)"[15] (Feecak, 2016).

The Salini Costruttori S.p.A. and Italstrade Sp.A. v. Kingdom of Morocco[16] case was the basis for arbitrators to provide a definition to the notion of investments (Dolzer, Shcreuer, 2012). The sufficient elements to identify the investment that is articulated to the court are recognized through the Salini test, that uses the investment and the related requirements in a cumulative way, i.e. contributing money and goods, certain duration, presence of elements at risk thus contributing to the economy of the host states.[17]

The Salini test was part of the decision of Biwater Gauff v. Tanzania[18] case as well as to the annulment by the court of the Malaysia Historical Salvors v. Malaysia case.[19]

The courts have taken into consideration the Salini test. This is based on some main arguments i.e. the criteria that find support

[15]Convention on the Settlement of Investment Disputes between States and Nationals of Other States, op. cit.

[16]Salini Costruttori SpA and Italstrade SpA v. Morocco, ICSID Case No. ARB/00/4, decision, jurisdiction, 16 July 2001.

[17]Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco, op. cit., para. 50-58.

[18]Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania, ICSID Case No. ARB/05/22, award 24 July 2008.

[19]Malaysian Historical Salvors, SDN, BHD v. Malaysia, ICSID Case No. ARB/05/10, jurisdiction, decision, 17 May 2007.

in Art. 25 of the ICSID Convention and in the preparatory works of the same Convention. In this way the definition of the investment is demonstrated in a deliberative way leaving the typology of the disputes to the parties. The arbitral practice concerns the investment in the ICSID Convention as well as the arbitral decisions. Independence and investment in accordance with Art. 25 of the ICSID Convention are based on the autonomy, that binds the investment in the ILA, thus, remaining faithful to the Salini test (Fecak, 2016; Mclachlan, Shore, Weiniger, 2017).[20]

[20]We do not forget that when we talk about investment we also talk about foreign investments. In this case the nationality of the investor to be taken into consideration and to be protected by the investment treaty and follow the arbitration procedure should present establishment criteria for the jurisdiction of the arbitral tribunal. That is, jurisdiction *ratione personae*. Within this spirit, protection is guaranteed by ILAs also to natural and legal persons, thus including multinationals. Thus the nationality of the investor which is linked to the national law is subject to discussion. Therefore, in some ILAs the criterion of habitual residence was alternatively with the criterion of nationality as we have seen in the case Article 1(3) Czech Republic-Germany BIT, October 2, 1990. in this case the investors who were in a state host and were excluded from the protection of citizens who were part of the contracting parties, dual nationality was valid. Therefore, Art. 25 (2) (a) of the ICSID convention is part of some ILAs. Regarding the nationality of the companies, the main criterion that was used by the ILAs was that of incorporation which is connected with the law of the state where the company was incorporated and has its registered office according to the

BITs are asymmetric and grant investors rights (Yackee, 2012). International investment agreements include binding rules that determine the limits of foreign investments made in their territory (Fecak, 2016).

Investment protection includes rules regarding expropriation and standards of Fair and Equitable Treatment (FET) and Full Protection and Security as well as standards regarding the form of Most Favorable Nation (MFN) and of the National Treatment (NT). We refer to provisions where the foreign investor within a stage of equilibrium respects the investor of nationality of the host state (NT) and of third countries (MFN). These are clauses that indicate the treatment that guarantees and grants to the host state its investors and the related guarantees of a treatment that is limited and/or perhaps absent.

The ILAs do not prohibit host states from treating investors in a way that allows for positive discrimination. The relevant standards are combined with standards of treatment that under a fair and equitable treatment (FET) ensures full protection for security within the territory of another contracting party. These

art. 17 (a) (ii) ECT where it also reads: "(…) a company or other organization organized in accordance with the law applicable in that contracting party (…)". Reference is also made to the Article 1(2)(b) Agreement between the Czech Republic and Georgia for the Promotion and Reciprocal Protection of Investments, signed on 20 August 2009.

are discriminations that are often analyzed separately from the FET standard dedicated to ILAs.

Courts have considered that the FET standard determines abusive conduct that violates legitimate expectations, abuse of power, threats, intimidation, use of force, similar measures that legitimize and reveal facts and disproportions. States are thus authorized to continue expropriating private property of foreigners under certain conditions (Dolzen, Schreuer, 2012). This is a perspective that is part of the ILAs and defines the conditions that respect expropriation considered legitimate (Fecak, 2016).

The wording of the provisions concerns expropriation according to the ILA, which is lawful and satisfies certain minimum conditions taken into consideration cumulatively. Such provisions pursue public utility, arbitrary and discriminatory expropriation as well as expropriation which accompanies timely adequate compensation for the expropriation procedure complied with the principles of due process (Dolzen, Schreuer, 2012).[21]

[21]Metalclad Corporation v. The United Mexican States, ICSID Case No. ARB(AF)/97/1, award, 30 August 2000, para. 103, "(...) expropriation under NAFTA includes not only open, deliberate and acknowledged takings of property, such as outright seizure or formal or obligatory transfer of title in favor of the host state, but also covert or incidental interference with the use of property which has the effect of depriving the owner, in whole or in

Most of the ILAs are existing and concern a mechanism for the resolution of disputes between foreign investors and host states in the form of international arbitration. Arbitrations concern disputes intended to be resolved in national courts and host states. The main advantage of arbitration has to do with the third-party and impartial nature of the judge.

The resolution of disputes between foreign investors and host states establishes most of the ILAs by allowing the investor to settle their disputes through the mixed arbitration or investor-state arbitration against the host state for treaty violations without the mechanism of dealing with diplomatic protection (Moloo, Khachaturian, 2011).

The ILAs are accompanied by a large number of international arbitrations between investors and states that have such agreements as their subject matter. The International Centre for Settlement of Investment Disputes constitute the arbitrators in a

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significant part of the use or reasonably-to-be-expected economic benefit of property even if not necessarily to the obvious benefit of the host state (...)". Indirect expropriation and what is called: creeping expropriation is a situation that has to do with the rights of the investor which are not only private but also those which protracted actions have determined the period of time for the erosion of the same rights. For the direct expropriation of property, see also: Generation Ukraine Inc. v. Ukraine, ICSID Case No. ARB/00/9, award, 16 September 2003, para. 20-22.

formal and binding manner the *stare decisis* that over the years has allowed the emergence of foreign investment disputes where the Convention on Settlement of Investment Disputes between nationals and states and by foreign states structures the resolution of disputes between investors and states (Fecak, 2016).

The ICSD Convention does not include substantive provisions for the protection of foreign investments nor does it establish a mandatory jurisdiction. Jurisdiction is established according to the express consent of the parties. Arbitral tribunals thus enforces previous decisions.

The proliferation of ILAs also include standard rules for the application of rules in investment arbitration which has led to principles that constitute a subsystem of an autonomous nature of international law (Fecak, 2016).

The general trend follows the application of substantive rules common in international agreements, in the interpretation of provisions where the tribunals are consistent with judgments that appear contradictory.

Investment case law and clean hands doctrine

Investment arbitration and the clean hands defense according to the legitimacy of the investor's conduct establish the investment in the host state until the relevant arbitration-inspired tribunal can arrive at a solution that allow compensatory justice (Douglas, 2014).

The clean hands doctrine prevents the relevant claimant from going beyond the preliminary phase that has to do with the dispute (Meschel, 2014). The defense shows that an argument is effective to convince any court and the investor to access *tout court* to international protection where the clean hands defense was established for arbitral tribunals declaring *sic et simpliciter* the relevant bases for the lack of jurisdiction and the inadmissibility of the dispute (Sornarajah, 2004; Knhar, 2007; Bottini, 2019; Kriebaum, 2010, Moloo, Khachaturian, 2011; Miles, 2012; Schill, 2012; Llamazon, Sinclair, 2015).[22]

[22]We must also take into consideration that in some BITs there are provisions where the investor relies on protection according to the relevant treaty and in the settlement where his investment takes place therefore he acts in accordance with the law of the host state. This limits the consent that is expressed by the same state that subjects the arbitration to a condition where the arbitral tribunal has its own jurisdiction over the dispute. If this precise terminology is missing from the treaty itself, the illegality of the investment is not considered as a condition precedent and the relevant

In the assessment of the host state's conduct (Habazin, 2016-2018) the investor is involved with the violations of the host state's domestic legislation and the investment treaty, i.e. the transnational public policy that respects the possibility of accessing the substantial protection of each treaty (Yackee, 2012). The clean hands defense demonstrates the powerful weapon in their hands for investors who confront investors by obtaining public contracts through unlawful acts (Hepburn, 2014). Thus the defense by arbitrators is accepted leading to the relative reliance in the argumentative practice.[23]

International investment arbitration is not part of every preceding concept, i.e. of the stare decisis. In such a case, the courts consider the ICSID cases as the relative guide in formulating their conclusions (Obersteiner, 2014).

Foreign investors respect the domestic law relevant to the ILA and international public order which considers and allows host states to invoke the clean hand defense (Douglas, 2014).

The clean hands doctrine applies to the investor involved in acts of fraud, misrepresentation, corruption, violations that deliberate

affirmation of jurisdiction is intended to reject the action of inadmissibility of the application as a way of exception in the merit phase.

[23]Tokios Tokelés v. Ukraine, op. cit., Incesya Vallesoletana S.L. v. Republic of El Salvador, op. cit., Phoenix Action Ltd. v. Czech Republic, op. cit., Fraport AG Frankfurt Airport Services Worldwide v. Philippines, op. cit.

the rules of the host state (Losco, 2013-2014).
The arbitral tribunal assessed the extent of the violation of the law that has to do with the investor as a tort that is committed by the investor and the action that has to do with the involvement of the host state in a tort where acquiescence respects itself.

Corruption

When we talk about international investment and business we refer to the danger of corruption which includes the transfer of values, money to public officials and to any official who acts according to his official functions.[24]
Corruption brings damage and general inefficiency to the decrease of economic investments. Prohibiting corruption is an essential rule for the legal systems that improve, amend, preserve national and international regulations (Sayed, 2004). In our days

[24]United Nation Convention against Corruption, signed in New York, 31 October 2003 (entered into force 14 December 2005), art. 15-16, General Assembly Resolution 58/4, U.N. Doc. A/58/422 affirms that: "(…) corruption for policy purposes are much more common. One frequently-used definition that covers a broad range of corrupt activities is the "abuse of public or private office for personal gain (...)". It is a useful reference for creating the relevant awareness policies and also the development of anti-corruption strategies as actions of measures for the prevention of corruption.

corruption is a complex topic both domestically and internationally (Llamzon, 2014) due to open markets that have to do with globalization and the factors that have contributed to overall levels of corruption phenomenon (Hwang, Lim, 2014).

According to the Global Corruption Barometer 2010 of Transparency International, corruption shows a continuous growth for foreign investors who complain of having lost business as well as the opportunity of investment in their competitors who have followed the path of corrupt activities.[25]

Developing countries through the general law of sustainability corruption have had the way of conducting business for states that continue with a tacit way to tolerate corrupt acts for their public officials and foreign investors who place the corrupt practices and guarantee the related result through the purchase of allies and investors. It happens against expropriations by the host state and against the possibility that the competitor gets the government contract in action (Summerfield, 2009).

At the international level, anti-corruption plays an important role[26] in international investment arbitration (Yackee, 2012; Lamm, Greenwald, Young, 2014). It represents the typical forum

[25]See also the Global Corruption Barometer: https://www.transparency.org/gcb201011 Accessed on 15.12.2024.

[26]In particular see Articles 125, 16, 18 and 21 of the UN Convention against Corruption (UNCAC).

for asserting the phenomenon of corruption (Cosar, 2015). Corruption allegations are continuous and ICSID tribunals allow host states as an exception to invoke the unclean hands of the investor who has put up corruption as a guarantee of a government contract.

ICSID tribunals have argued that the decisions declare and ignore the negativity that corruption causes (Morchiladze, 2012). The tribunals accept that the existence of investments is contrary to international public order (Michale, Losco, 2014). This consequence gives effect to contracts that ensure the protection of an investment treaty that taints the wrongful act (Odumosu, 2011).

ICSID tribunals have followed the path of punishing corrupt activities by denying judgments related to the relevant remedy (Summerfield, 2009). The clean hands doctrine calls on investors with private states to protect their rights related to violations of host states (Lamm, Greenwald, Young, 2014).

Obtaining a government contract through an effective defense strategy for host states takes corruption into account (Losco, 2013-2014). This occurs because states are able to avoid liability for investment-related violations as well as *de facto* compensation obligations that benefit the violation of international investment law (Meschel, 2013).

ICSID tribunals raise the unclean hands defense after permission is given to the defendant states and the investor who has committed acts of corruption by securing a public contract. Thus ICSID tribunals accept the unclean hands defense, where a consolidated arbitral jurisprudence (Racine, 1999; Sayed, 2004; Laird, Askew, 2005; Heiskanen, 2008; Wetter, 1994)[27] is created

[27]According to Heiskanen: "(…) one must distinguish between: a)the law governing the arbitration agreement; (b) the law governing the arbitral proceedings; (c) the law governing the arbitral tribunal; (d) the law governing the merits of the claim, or the subject matter of the dispute; and (e) the law governing the recognition, enforcement and execution of the award (...)". Lagergren noted that: "(…) there exists a general principle of law recognized by civilized nations that contracts which seriously violates *bonos mores* or transnational public policy are invalid or at least unenforceable and that they cannot be sanctioned by courts or arbitrators (…) bribery is an international evil and contrary to good morals and an international public policy common to the community of nations (…) parties who ally themselves in an enterprise (…) gross violations of good morals and transnational public policy (…) must realize that they have forfeited any right to ask for assistance of the machinery of justice (…) in settling their disputes (…)". According to Sayed: Westacre v. Jugoimport ICC Award 7047, Bulletin de l'Association suisse de l'arbitrage, 1995, p. 332: "(...) was bound to give effect to the provisions of the law which is excluded only to the extent that they are part of the international public order (...) examples of this are provisions to fight corruption and bribery (…)". World Duty Free Company Lyd. v. Republic of Kenya, op. cit., See also: Republic of Croatia

for the codification of principles that address corruption, such as the OECD Anti-Bribery Convention[28] and the diffusion of domestic laws that originate from US law that criminalize the relevant foreign bribery practices.[29] This is an element that conflicts with the transnational public policy that condemns corruption by pushing a host state to escape its liability for expropriation through corruption (Yackee, 2012).

Consequently, corruption is condemned by states of an

v. MOL Hungarian Oil and Gas Plc, PCA Case n. 2014-15, award, 23 December 2016: "(…) generally accepted that corruption is a cancer that eats into the body politic. Many governments and international organizations have done much in recent years to attempt to stamp it out. Unfortunately it is endemic in certain parts of the world. Issues of corruption sometimes arise in international arbitration and arbitrators must be on their guard to ensure that they are not used as a mean of disguising this evil (...)".

[28]OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, signed on 17 December 1997 (entered into force on 15 February 1999). United Nation Convention Against Corruption (UNCAC A/58/422) signed on 31 October 2003, entered into force on 14 December 2005.

[29]See Art. 8 of the Civil Law Convention on Corruption, Council of Europe, ETS No. 174, signed on Strasbourg (November 1999 and entered into force on 1st November 2003 affirms that: "(…) a part shall provide in its internal law for any contract or clause of a contract providing for corruption to be null and void (…)".

international public nature which leads to a violation of the transnational public policy of a truly international policy (Lalive, 1987).[30] It is a violation of public international law which denies any remedy to investors.[31]

Arbitral tribunals take into account the principle that allows contracts to provide the relative protection of an investment treaty after the corruption taint (Odumosu, 2011) based on acts of corruption contrary to national laws and international law of transnational public policy (Lalive, 1987).[32] Thus, a defense for

[30]World Duty Free v. Kenya, op. cit., Metal-Tech v. Republic of Uzbekistan, op. cit.

[31]Inter-American Convention Against Corruption adopted on 29 March 1996 (entered into force 3 June 1997), OECD Convention on Bribery of Foreign Public Officials in International Business Transactions adopted on 21 November 1997 (entered into force 15 February 1999), Council of Europe Criminal Law Convention on Corruption adopted 4 November 1998 (entered into force 18 June 2002), United Nations Convention against Transnational Organized Crime adopted 15 November 2000 (entered into force 29 September 2003), Council of Europe Civil Law Convention, op. cit.,, Southern African Development Community Protocol Against Corruption, adopted 14 August 2001 (entered into force 6 July 2005), United Nations Convention Against Corruption, adopted 13 October 2003 (entered into force 14 December 2005), The African Union Convention on Preventing and Combating Corruption, adopted July 11, 2003 (entered into force 5 August 2006).

[32]According to Lalive: "(…) corruption is condemned by most if not all

corruption is accepted by the arbitral tribunal and the private states of investors protect their rights which are substantive and arising from ILA and/or from a contract concluded with the host state through a declaration of inadmissibility of the dispute (Habazin, 2016-2018).

Host states, thus, avoid their own responsibility to report violations that have to do with investment and compensatory obligation by benefiting from the acquiescence and involvement of public officials in their illicit activities (Meschel, 203).

Within this context, the award in the World Duty Free v. Republic of Kenya case of 2006 is recalled, as an international arbitration (Urofsky, Weisburg, Torres-Flower, 2015), where: "(...) the World Duty Free a case based on a government concession contract between the investor and the host state, until Metal-Tech Ltd. v. the Republic of Uzbekistan, no investment treaty arbitration has been resolved on the grounds of corruption by an ICSID tribunal (...) highlighted the growing importance of corruption concerns in international investment scenarios and reminded the business community, as well as legal professionals, that corruption is not a marginal issue that can be underestimated

states, doctrine and jurisprudence have increasingly lead it back to a violation of transnational (or "truly international") public policy, as well as a violation of public international law (...)". Metal-Tech Ltd. v. Republic of Uzbekistan, op. cit.

(...)" (Cowley, Bridi, 2014). The topic of corruption and of public officials of the host state has become one of the topics of disputes between investors and states invoked on the basis of a pure clean hands defence (Partasides, 2007).

The World Duty Free Company Ltd. v. Republic of Kenya case

The standards of anti-corruption in domestic laws are incorporated into international law as well as into the transnational public policy which condemns corruption and allows the host state to be exempt from liability for the unlawful expropriation of the investment, according to the World Duty Free Company Ltd. v. Republic of Kenya case.[33]

According to the contract it is established: "(…) the construction, maintenance and operation of duty-free complexes at Nairobi and Mombassa International Airports" dated 27 April 1989 between

[33]"(i) use of World Duty Free in the Goldenberg fraud; (ii) illegal expropriation of the Company; (iii) placing of World Duty Free in receivership; (iv) damage suffered from Court-appointed "receiver"; (v) Court refusal to protect World Duty Free from crime; (vi) unlawful deportation of the company's Chief Executive Officer; (vii) final judgment in defiance of ICSID; and (viii) registration of a duplicate World Duty Free during the pendency of the ICSID proceedings".

the foreign company and Kenya[34] at an ICSID arbitration which took place in Kenya. The foreign company complained that the government in Kenya has unlawfully expropriated the relevant investment and has breached the obligations contained in the contract: "(…) using its executive, judiciary and agents like Kamlesh Pattni and his hand picked purported receivers (…)". The related arbitration proceedings allowed the investor to provide the court with relevant evidence that it obtained the government contract and paid US$ 2 million to the President of Kenya (Rose, 2014) stating that the donation was according to Kenya's 'cost of business' (Yackee, 2012).

Kenya took advantage of an admission that argued and rejected the investor's unclean hands. The ICSID tribunal relating to the arbitration award thus accepted the relevant Kenyan defense by establishing that the foreign investor could not claim compensation for damages suffered from the unlawful expropriation of the investment when the World Duty Free committed acts of corruption to obtain it.

In this spirit, the tribunal declared that: "(…) Claimant is not legally entitled to maintain any of its pleaded claims in these proceedings as a matter of public international order and public policy under the contract's applicable laws claims (…) on the

[34]World Duty Free, op. cit., para. 62.

ground of the Latin *ex turpi causa non oritur actio* since all the issues raised in arbitration "sound(ed) or depend(ed) upon" the concession agreement tainted by corruption (…) the admission of the payment of a bribe by the investor (Partasides, 2007) led the ICSID tribunal to conclude that, if the rights arising from an investment contract procured through corruption had been recognised and the claims advanced by the investor had been allowed to proceed, this would have violated transnational public order (…)".[35]

Public corruption was tolerated in Kenya as part of the Harambee system which was legally irrelevant (De Klapiers, 2014). The court denied a decision in favor of the investor allowing Kenya to benefit from the related actions which in practice were corrupt acts to its President and to the profit of expropriation (Yackee, 2012).

The court ignored the related involvement of the host state and the corrupt activities which were significant to the interest of the arbitral community have considered that the clean hands defense allowed a host state to escape its responsibilities despite the fact

[35]World Duty Free, op. cit., para. 179, "(…) public policy both under English law and Kenyan law (being materially identical) and on the specific facts of this case, the Tribunal concludes that the Claimant is not legally entitled to maintain any of its pleaded claims in these proceedings on the ground of *ex turpi causa non oritur actio* (…)".

that public officials were involved in corrupt activities for the investor who had no choice in obtaining the government contract to pay the related bribe.

The Metal-Tech Ltd. v. Republic of Uzbekistan case

Talking about the protection of the substantive rights of the investor who comes from a rejected investment treaty, according to the corruption of public officials of a host state, gives reason to the unclean hands dealing with the investor by an ICSID tribunal as is the Metal-Tech Ltd. v Republic of Uzbekistan case of 4 October 2013 (Perry, 2013).[36]

The obligations arising and violated under the ICSID arbitration against Uzbekistan incorporate domestic law and the BIT.[37] In this way, it allows for a fair and equitable investment and full protection and security (FET) thus expropriating Metal-Tech without due process (Meschel, 2014).[38] Uzbekistan rejected

[36]Metal-Tech Ltd. v. Republic of Uzbekistan, op. cit.

[37]Agreement between the government of the state of Israel and the government of the Republic of Uzbekistan for the reciprocal promotion and protection of investments (Israel-Uzbekistan BIT) of 4 July 1994.

[38]Para. V: "(…) Uzbekistan violated its obligation to accord Israeli investments fair and equitable treatment pursuant to Article 2(2) of the BIT, namely its obligation not to frustrate the legitimate expectations engendered

Metal-Tech's claims stating that: "(…) illegality in the Claimant's investment bars jurisdiction over claims and filed counterclaims to recover damages allegedly sustained due to the unlawful conduct of Metal-Tech[39] (...) Tribunal lacks jurisdiction over this dispute because the Claimant's investment was 'implemented', i.e. made and operated, in violation of Uzbek law (...) Claimant engaged in corruption and made fraudulent and material misrepresentations to gain approval for its investment. It also implemented its investment unlawfully by unjustly enriching

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by the representations and commitments which it made and on which the Claimant relied in making its investment (…)". Para. VII: "(…) Uzbekistan violated its obligation to provide full protection and security to Metal-Tech's investment in violation of Article 2(2) of the BIT (…) by revoking the legal guarantees set forth in Resolution No. 15, the Respondent violated its obligation to provide Metal-Tech with a secure commercial and legal environment (…) not intervening when UzKTJM denied Uzmetal access to its facilities in Chirchik, Uzbekistan violated its obligation to provide Claimant's investment with physical security (…)". Para. VI: "(…) Uzbekistan's measures against Uzmetal were taken in willful disregard of due process and proper procedure (…)".

[39]Agreement between the government of the state of Israel and the government of the Republic of Uzbekistan for the reciprocal promotion and protection of investments (Israel-Uzbekistan BIT), op. cit., "(...) claimant engaged in corruption and made fraudulent and material misrepresentations to gain approval for its investment (…)".

itself and defrauding the JV, the Uzbek partners and the state (...)"[40].

The court concluded that the payments made by the investor amounting to approximately US$4 million to a public official, the brother of the Prime Minister of Uzbekistan and some other individuals presented as remuneration for consultancy services constituted allegations of corruption (Meschel, 2014) in violation of the obligation under the BITs to make investments in accordance with Uzbek law.

The Tribunal held, in this regard, that: "(…) corruption is established to an extent sufficient to violate Uzbekistan law in connection with the establishment of the Claimant's investment in Uzbekistan (…) the investment was not made in accordance with the laws and regulations of the Contracting Party in whose territory the investment is made as required by Article 1(1) of the relevant BIT[41] (…) Uzbekistan's consent to the arbitrability of a dispute under Article 8(1) of the same BIT was limited to disputes concerning an investment (…) Article 1(1) of the BIT restricted the notion of investment only to those financial transactions developed in accordance with local law (…) the Tribunal concluded that the present dispute does not come within

[40]Metal-Tech Ltd. v. Republic of Uzbekistan, op. cit., para. I.

[41]Metal-Tech Ltd. v. Republic of Uzbekistan, op. cit., para. 372.

the reach of Article 8(1) and is not covered by Uzbekistan's consent. This means that this dispute does not meet the consent requirement set in Article 25(1) of the ICSID Convention. Accordingly, failing consent by the host state under the BIT and the ICSID Convention, this Tribunal lacks jurisdiction over this dispute (…) condemns corruption under international law and the laws enacted by the majority of states, international anti-corruption conventions and previous decisions, but relies mainly on the interpretation of the BIT, Uzbek law and the ICSID Convention to reject the investor's action (…) corruption is established to an extent sufficient to violate Uzbekistan law in connection with the establishment of the Claimant's investment in Uzbekistan (…) since the claims brought in this arbitration seek to establish the responsibility of a State for breach of the latter's international obligations, it is appropriate to apply international law to the burden of proof (…) each party has the burden of proving the facts on which it relies is widely recognised and applied by international courts and tribunals" (*maxim actori incumbat probatio*)[42] (…) it notes that corruption is by essence difficult to establish and that it is thus generally admitted that it can be shown through circumstantial evidence (…) the Claimant was unable to substantiate its contention that

[42]Metal-Tech Ltd. v. Republic of Uzbekistan, op. cit., para. 237.

actual services had been carried out for legitimate purposes in return for those payments (…)"[43].

From the positions of the Tribunal that we have noted so far, we understand that the facts presented as a series of red flags that establish the international community, i.e. indicators of corruption, allow for the investor's payments that were illegal and according to Uzbek law: "(...) the amount of payments made by the investor, the fact that these were disproportionate to the services provided, the lack of professional qualification of the consultants and the lack of transparency of the payment methods, as well as the close connection of some of the consultants with Uzbek public officials responsible for approving the investor's investment and the investor's inability to provide a clear and logical explanation justifying the legitimacy of the services for which the payments had been made (...) Uzbek law as well as the

[43]Metal-Tech Ltd. v. Republic of Uzbekistan, op. cit., para. 238 and 243. "(…) allegations of corruption, the burden should be shifted to the Claimant to establish that there was no corruption. Rules establishing presumptions or shifting the burden of proof under certain circumstances, or drawing inferences from a lack of proof are generally deemed to be part of the *lex causae*. In the present case, the *lex causae* is essentially the BIT, which provides no rules for shifting the burden of proof or establishing presumptions. Therefore, the Tribunal has relative freedom in determining the standard necessary to sustain a determination of corruption (…)".

ICSID Convention and on the basis of the circumstantial evidence adduced, the Tribunal therefore found that it lacked jurisdiction tout court over the dispute (...) corrupt conduct carried out by the same, the Tribunal declared that it was sensitive to the ongoing debate that findings on corruption often come down heavily on claimants, while possibly exonerating defendants that may have themselves been involved in the corrupt acts. It is true that the outcome in cases of corruption often appears unsatisfactory because, at first sight at least, it seems to give an unfair advantage to the defendant party. The idea, however, is not to punish one party at the cost of the other, but rather to ensure the promotion of the rule of law, which entails that a court or tribunal cannot grant assistance to a party that has engaged in a corrupt act (...)".[44]

The court rejected the request made by Metal-Tech, recognizing that the corruption was bilateral and the host state participated in the corrupt conduct, deciding on the related distribution of costs. The court according to its decision reported in this regard: "(…) the state has not participated in creating the situation that leads to the dismissal of the claims. Because of this participation, which is implicit in the very nature of corruption, it appears fair that the parties share in the costs (…)".

[44]Metal-Tech Ltd. v. Republic of Uzbekistan, op. cit., para. 389.

The decision, in this regard, did not take into consideration World Duty Free's position on corruption related to international investments, highlighting and rejecting the complaint based on corrupt activities that respond to the overall justice of a system that essentially and bilaterally takes into account every consideration for the conduct of the host state.[45]

The Siemens A.G. v. Argentine Republic case

Many times an arbitration has not arrived at a complete and precise award in relation to corruption as we saw in the Siemens A.G. v Argentine Republic case,[46] which has demonstrated the potential extrajudicial benefits of a defence that had to do with unclean hands.

A German multinational company Siemens initiated arbitration at ICSID against Argentina on the basis of the BIT between Argentina and Germany[47] accusing that the host state did not

[45]Metal-Tech Ltd. v. Republic of Uzbekistan, op. cit., para. 3889.

[46]Siemens A.G. v. Argentine Republic, ICSID Case No. ARB/02/08, award, 6 February 2007: https://www.italaw.com/cases/1026 Accessed on 15.12.2024.

[47]Treaty on the Mutual Protection and Promotion of Investments between the Federal Republic of Germany and the Argentine Republic of 9 April 1991.

comply with the FET standard instead has imposed discriminatory and arbitrary measures against the investment.[48] The ICSID tribunal thus declared that Argentina was in violation of the relevant BIT. The actions of the Argentine government constituted a form of illegal expropriation[49] of approximately 200 million dollars (Losco, 2013-2014).[50]

The annulment proceedings initiated by Siemens considered the Argentine executives bribers (Yackee, 2012). Siemens was involved in corruption investigations and admitted its guilt to the settlement agreements and the American and German anti-corruption authorities. Argentina asked the ICSID tribunal to re-examine the award that was issued.

A second review of the arbitration proceedings convinced Siemens to continue and redefine an agreement at a higher price

[48]Siemens A.G. v. Argentine Republic, op. cit., para. 195.

[49]Siemens A.G. v. Argentine Republic, op. cit., para. 273 "(…) the expropriation be for a public purpose and compensated. The Tribunal finds that there is no evidence of a public purpose in the measures prior to the issuance of Decree 669/01. It was an exercise of public authority to reduce the costs to Argentina of the contract recently awarded through public competitive bidding, and as part of a change of policy by a new administration eager to distance itself from its predecessor (…) compensation has never been paid on grounds that, as already stated, the tribunal finds that are lacking in justification (...)".

[50]Siemens A.G. v. Argentine Republic, op. cit.

thus agreeing to forgo the related compensation of 200 million dollars in exchange for the consent of Argentina to discontinued the annulment and review the proceeding. The relative irrelevance of corruption is not considered for the arbitration proceeding.

The tribunal did not have the opportunity to pursue the legal consequences for the corruption charges thus formulating an exception that concerned the arbitrator considering public corruption in contractual disputes to be probable for the ICSID tribunal having the possibility that the reference of a transnational public order condemns corruption and denying that Siemens has demonstrable corrupt behavior.

The MOL Hungarian Oil and Gas Plc v. Republic of Croatia case

Between 2003 and 2007 the Croatian authorities conducted a related privatization process in their country of an oil and gas company called INA Industrije Nafta d.d. (INA) and MOL Hungarian Oil and Gas PLC (MOL), a Hungarian company that acquired a share of 25% + 1. The Croatian government signed a shareholders' agreement reducing its shareholding until the renegotiation of the shareholder agreement which in 2008 it used to increase MOL's shareholding in INA to 29.08%. The

negotiations were concluded in January of 2009 (Shareholders' agreements) as a result of the MOL transactions. Its main shareholder was INA with a shareholding of less than 50%, i.e. the management control of the company.

The arbitrations that are opposed to MOL and the Croatian government are based on the rules of the UNCITRAL.

MOL Hungarian Oil and Gas PLC has pursued an arbitration under the Energy Charter Treaty (ECT)[51] based on unfair and inequitable treatment for the expropriation of the relevant Croatian government positions in respect of its investment in INA (Kopar, 2021; Boute, 2022). In January of 2014 the Croatian government initiated a parallel arbitration against MOL under the UNCITRAL rules invalidating the shareholders agreements of 2009.[52]

In this proceeding the Croatian government requested to declare the agreements of 2009 void due to corruption that took place during the conclusion of agreements when Croatian Prime Minister Ivo Sanader was in office and MOL paid damages caused by its recognized conduct in favor of Croatia.

[51]MOL Hungarian Oil and Gas Plc v. Republic of Croatia, ICSID Case No. ARB/13/32: https://www.italaw.com/sites/default/files/case-documents/italaw4073.pdf. Accessed on 15.12.2024.

[52]Republic of Croatia v. MOL Hungarian Oil and Gas Plc, op. cit.

In both arbitrations just referred to the main argument was the Croatian government where MOL procured the agreements of 2009. The host state highlighted the circumstances after the elements it had in its hands for Sanader, whom it sentenced with a prison sentence of about eight years by the Croatian court for having received bribes of about five million euros from the investor MOL as a facilitation exchange of the share agreements of 2009.

In July 2015 the Croatian Supreme Court overturned the conviction for corruption against Sanader based on procedural errors and ordered a review of the trial thus initiating the indictment against its president for having paid bribes to secure MOL a share in INA but nevertheless the president Hernadi was thus acquitted of the charge.[53]

The investor did not make a valid investment and the court did not have its jurisdiction over the case (Obersteiner, 2014).[54] No criminal conviction for MOL and Hernadi in the 2009

[53]MOL Hungarian Oil and Gas Plc v. Republic of Croatia, op. cit., para. 17, p. 5.

[54]MOL Hungarian Oil and Gas Plc v. Republic of Croatia, op. cit., para. 55, "(…) First Amendment and the GMA will not only feature at the merits stage of these proceedings but will also form a jurisdictional objection based on *inter alia* lack of consent, lack of "investment", lack of good faith and violation of public policy (…)".

shareholding agreements despite efforts by the host state to secure control of INA *ex novo* are noted.[55]

MOL strongly argued that the Croatian criminal proceedings were not available to the ICSID court. Corruption as evidence was easy, it points out. For MOL, the ICSID court established and addressed the situation unlike what it saw in the cases of World Duty Free and Metal-Tech where the investor was against reporting corruption while the facts and circumstances suggested the 2009 share deals to be contaminated by the crime of corruption.

The ICSID court established that the burden of proof was satisfied by the assertion of red flags to the global community as indicators of a corrupt activity. The court found the condition of resorting to presumptions and not to full evidence. Therefore, it was the discretion of each judge in this case to accept or not the evidence as well as the jurisdiction of the claims that are filed by MOL itself.[56]

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[55]MOL Hungarian Oil and Gas Plc v. Republic of Croatia, op. cit., para. 17, p.5.

[56]MOL Hungarian Oil and Gas Plc v. Republic of Croatia, op. cit., para. 81-83: "(…) it relied upon the fact that Dr Sanader had been convicted of bribery by the Zagreb County Court and the conviction had been upheld by the Court of Appeal (…) Croatia did not submit that this Tribunal was bound by that conviction and, indeed, there was no challenge to the expert

The tribunal in the MOL arbitration did not consider that the investor was entitled to access international protection (Smutny, Polàsek, 2012). Thus the clean hands defense was invoked and the Croatian government hoped that the ICSID tribunal would reject the investor's related claim by imposing financial responsibility on Croatia.

The court followed the path of the Plama case. It concerned investments that were contrary to international and domestic law[57] despite the fact that the ECT did not provide otherwise.

reports from Judge Schwebel and Professor Reisman to the contrary effect, Croatia submitted that the conviction was nevertheless a factor which this Tribunal should take into account. Secondly, Croatia relied upon the evidence of Mr Jedio, who had given statements to USKOK, had given evidence at the trial of Dr Sanader, and finally gave evidence before this Tribunal in May 2015. His evidence, says Croatia, establishes the bribery without any doubt. The third strand of evidence was from Mr Horlimann. The Tribunal thought originally that he was a lawyer, as he was a partner in the law firm of Wenger and Vieli, which is based in Zug. Mr HOrlimann, who had been involved in some of the transactions to be considered below and was certainly acting on behalf of Mr Jedio and his companies, gave voluntary statement to USKOK, which was placed before the Sanader trial court when Mr Hurlimann declined to attend the Sanader trial (…)".

[57]Such as Croatia, which has ratified the Council of Europe Criminal Law Convention against Corruption. A paragraph of the Croatian penal code considered the crime of corruption from an active and passive perspective, thus approving changes that concerned money laundering, illicit influence

In practice, the court took into account the fact that the ECT interpreted the Vienna Convention on the Law of Treaties (VCLT) of 1969 and the preamble of ECT to establish the aim of the treaty with the: "(…) strengthen the rule of law on energy issues (…) (Smutny, Polàsek, 2012) the substantive protection afforded by the ECT cannot be applied to illicit investments (…) the investment in question has violated not only Croatian legislation, but also international law, pursuant to Article 26(6) of the ECT, which provides that disputes shall be decided in accordance with applicable rules and principles of international law (…) applicable principles of international law could certainly include the principle of good faith, the principle that *nemo auditur propriam turpitudinem allegans*, as well as the notion of transnational public policy (…)".

The Tribunal concluded with respect to the ECT and MOL investments that the basic notions of the transnational public order to accept the defense of the unclean hands where the host state to exclude the MOL from the recovery of its investment and to put the ECT to the shareholders agreements of 2009 that took

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trafficking, abuse of office and authority as well as unfair competition which concerns international affairs and bankruptcies, etc. In Plama case (Plama Consortium Ltd. v. Republic of Bulgaria, op. cit.,) the tribunal affirmed: "(...) the protection provided for by the ECT cover all kinds of investments, including those contrary to domestic or international law (...)".

place through corruption.

The consequences of corruption falls on the MOL investor and the Tribunal has controlled the illegal actions in both the host state and the investor. It did not to accept the absolute measure and the defense of the clean hands of the host state.[58]

The ICSID arbitration as well as the outcome of the UNCITRAL arbitration of 2016 rejected the request of Croatia to pursue the annulment of the agreements of 2009 holding that the Croatian government did not provide sufficient facts relating to corruption. Furthermore, such facts did not take place through the process of formation of the relevant shareholders agreements.[59]

The Niko resources (Bangladesh) v. Bangladesh case

In Niko Resources v. Bangladesh case[60] the strange thing is that there is no relevant BIT but only a government approved joint

[58]"(…) rules, orders and awards that Croatia's claim based on bribery, corporate governance and MOL's alleged breaches of the 2009 Shareholders' Agreements are all dismissed (…)".

[59]Republic of Croatia v. MOL Hungarian Oil and Gas Company Plc, op. cit., para. 459.

[60]Niko Resources (Bangladesh) Ltd. v. Bangladesh, petroleum Exploration & Production Company Limited (Bapex) and Bangladesh Oil Gas and Mineral Corporation (Petrobangla), ICSID Case No. ARB/10/18.

venture agreement. The decision based on the clean hands doctrine and consequently corruption.

The People's republic of Bangladesh, Bangladesh Petroleum Exploration & Production Company Limited (Bapex) and Bangladesh Oil Gas and Mineral Corporation (Petrobangla) argued that the Niko resourses did not benefit from the arbitration clause of the ICSID which was contained in the Joint Venture agreement. Thus, the defendants argued that (…) jurisdiction must be denied because the Claimant has violated the principles of good faith and international public policy (…) dismissing a claim which represents a violation of fundamental principles of law (…)"[61].

The relevant award referred to other cases of the ICSID.[62] The respondents stated, in this regard, that: "(…) the Phoenix tribunal, 'the purpose of the international protection is to protect legal and bona fide investments'. Thus when there is an allegation of fraudulent conduct by the foreign investor, tribunals should examine all the circumstances surrounding the lifespan of

[61]Niko Resources (Bangladesh) Ltd. v Bangladesh, petroleum Exploration & Production Company Limited (Bapex) and Bangladesh Oil Gas and Mineral Corporation (Petrobangla), op. cit., par. 374.

[62]Phoenix Action Ltd. v. Czech Republic, op. cit., para. 106; Gustaf F. W. Hamester Gmb Hamp Co. KG v. Republic of Ghana, ICSID Case No. ARB/07/24, award, 18 June 2010, (Hamester), para.123.

the investment, having direct relation to the investment claim. As stated by the Phoenix tribunal, one function of an ICSID tribunal is 'to prevent an abuse of the system of international investment protection under the ICSID Convention, in ensuring that only investments that are made in compliance with the international principle of good faith and do not attempt to misuse the system are protected[63] (…) jurisdiction should be denied because the Claimant has violated the principles of good faith and international public policy, in a manner intimately linked to the alleged investment (…) The Claimant does not bring this claim with clean hands (...)"[64].

[63]Niko Resources (Bangladesh) Ltd. v. Bangladesh, petroleum Exploration & Production Company Limited (Bapex) and Bangladesh Oil Gas and Mineral Corporation (Petrobangla), op. cit., para. 375.

[64]Niko Resources (Bangladesh) Ltd. v. Bangladesh, petroleum Exploration & Production Company Limited (Bapex) and Bangladesh Oil Gas and Mineral Corporation (Petrobangla), op. cit., para. 376-377 "(…) (1) An admitted aim of the two acts of bribery set out in the Agreed Statement of Facts was "to persuade the Bangladesh Energy Minister to exercise his influence to ensure that Niko was able to secure a gas purchase and sales agreement acceptable to Niko" (the other being "to ensure the company was dealt with fairly in relation to claims for compensation for the blowouts"): (2) As defined in domestic and international law, an act of bribery is complete when the benefit is provided to the public official, with the intention of influencing that official's performance of his or her functions.

Challenging the jurisdiction the defendants claimed that: "(...) corruption is unlawful in domestic and international law (…) bribery is illegal under the law of Bangladesh (...) condemned throughout the world (…) corruption is contrary to the principles of good faith, clean hands and international public policy. It is widely accepted that the prohibition of bribery is of such

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Whether or not the bribe in fact causes the official to act as the briber desired is not within the briber's control, and does not affect the gravity of the briber's conduct. (3) Whether or not the bribe had a causal link with the conclusion of the contract may be relevant where one party to the contract argues that it is void or voidable. (4) The respondents do not intend to argue that the contract is void or voidable, by reason of corruption or otherwise. They would, of course, revisit this position if further disclosure made it appropriate to do so; (5) The question in this case is whether ICSID jurisdiction should be denied to a claimant which attempts to procure a contract by bribery, or only to one which succeeds. (6) The respondents intend to argue that the Tribunal should decline jurisdiction because, in attempting to procure by bribery the very agreement on which its jurisdiction would be based, the Claimant has violated the principles of good faith and international public policy, in a manner intimately linked to the alleged investment. The Tribunal is empowered to protect the integrity of the ICSID dispute settlement mechanism by dismissing a claim which represents a violation of fundamental principles of law. The Claimant does not bring this claim in good faith or with clean hands. That is not affected by whether or not, on the facts, the bribery achieved its admitted purpose (…) the respondents submit that the fact that the Claimant's proven bribery was

importance for the international legal order that it forms part of what has been described as international or transnational public policy. Arbitral awards and learned writers have supported this position. The matter was considered in particular detail and with admirable erudition in the World Duty Free case by a distinguished tribunal (...)"[65]. The court in the Niko Resources case stated that it was unaware of the provisions and further developments where the prohibition of corruption was part of transnational, international public policy.[66]

Regarding the clean hands doctrine the counter-memorial stated that: "(…) clean hands principle is well recognized in common law (…)". It is also referring to the individual opinion of judge Manley Hudson in the case before the Permanent Court of International Justice.[67]

The arbitration panel in Niko Resources case stated that: "(…)

intended to procure the conclusion of that Agreement (the GPSA) suffices as a bar to the admissibility of the claim".

[65]In case World Duty was affirmed that: "(…) bribery is contrary to the international public policy of most, if not all, states or, to use another formula, to transnational public policy (…) claims based on contracts of corruption or on contracts obtained by corruption cannot be upheld by this arbitral Tribunal (…)".

[66]World Duty Free, op. cit., para. 431-433: "(…) who seeks equity must do equity (…)".

[67]Netherlands v. Belgium, (1937) PCIJ, Series A/B, No. 70, para. 73ss.

clean hands is known as part of equity in common law countries. The question whether the principle forms part of international law remains controversial and its precise content is ill defined. The situation has been analyzed in great detail in a recent award in the Guyana v. Suriname case by an Arbitral Tribunal Constituted Pursuant to Article 287, and in Accordance with Annex VII of the United Nations Convention on the Law of the Sea (UNCLOS). That UNCLOS Tribunal found: "No generally accepted definition of the clean hands doctrine has been elaborated in international law".

Indeed, the Commentaries of the ILC Draft Articles on State Responsibility acknowledge that the doctrine has been applied rarely and, when it has been invoked, its expression has come in many forms.

The ICJ has on numerous occasions declined to consider the application of the doctrine, and has never relied on it to bar admissibility of a claim or recovery. However, some support for the doctrine can be found in dissenting opinions in certain ICJ cases, as well as in opinions in cases of the Permanent Court of International Justice (PCIJ). Particularly, these "(…) cases indicate that the use of the clean hands doctrine has been sparse, and its application in the instances in which it has been invoked

has been inconsistent (…)" (Leigh Anenson, 2018)[68].

The UNCLOS arbitral tribunal considered: "(...) the inadmissibility formulated by the respondent state on the basis of the "unclean hands" of the counterparty considered that the doctrine in question could operate in international law if three conditions were satisfied (derived from the jurisprudential practice that had dealt with clean hands): "(i) the breach must concern a continuing violation, (ii) the remedy sought must be "protection against continuance of that violation in the future", not damages for past violations and (iii) there must be a relationship of reciprocity between the obligations considered (…)"[69].

It is immediately clear that the judges did not consider the clean hands doctrine based on common law but: "(…) primarily because of its recognition in the domestic orders of many States, it must be qualified as a general principle of law (Kreindler, 2010; Dumberry, Dumas-Aubin, 2013).

Concerning the substantive content of the principle in international law, it has been summarized by Fitzmaurice: "(…) he who comes to equity for relief must come with "clean hands" (…) a state which is guilty of illegal conduct may be deprived of

[68]Guyana v. Suriname, PCA Case 2004/04, award, 16 September 2007, para. 418.

[69]Guyana v. Suriname, PCA Case 2004/04, op. cit., para. 420-442.

the necessary *locus standi in judicio* for complaining of corresponding illegalities on the part of other States, especially if these were consequential on or were embarked upon in order to counter its own illegality-in short were provoked by it (…)" (Fitzmaurice, 1957).

The application of the relevant principle, as a kind of reciprocity and as an *exceptio non adimpleti contractus*, was on par with the opinions of the judge Schwebel in the case concerning military and paramilitary activities in and against Nicaragua (Liakopoulos, 2020b).[70]

The clean hands doctrine was not mentioned and expressed according to the relevant practice of actions that are dismissed due to lack of jurisdiction and/or inadmissibility as the relevant *petitum* that was obtained in an illicit way "(...) in accordance with the law of the host state (…)".[71]

These types of considerations are in accordance to a formulated objection by the defendants based on the relevant unclean hands doctrine satisfying the criteria of the judge Hudson as well as of the UNCLOS arbitral tribunal that identified the application of the doctrine according to international law which excluded the application of the doctrine by denying its existence in

[70]Case Concerning Military and Paramilitary Activities in and Against Nicaragua and the Dissenting Opinion of judge Schwebel.

[71]Niko Resources (Bangladesh) Ltd. v. Bangladesh, op. cit., para. 482.

international law.

The Plama Consortium Ltd. v. Republic of Bulgaria case

In the matter of fraud and false declarations connected to an investment, the leading case is represented by Plama Consortium Ltd. v. Republic of Bulgaria, on the interpretation of ECT.

In Plama, the investor complained of having been "victim of a series of unlawful acts and omissions which individually and cumulatively defeated his efforts to operate the Refinery beyond 1999 and make good its investment".[72] In particular, it concerned the "violation of several of the protections owed by Bulgaria under Articles 10(1) and 13 of the ECT".[73]

In the case in question, the host state contested the jurisdiction of the court, holding that the foreign investment was void ab initio under Bulgarian law due to the false declaration made at the

[72]Claimant's Memorial on the Merits, para. 9.

[73]Plama Consortium Ltd. v. Republic of Bulgaria, op. cit., para. 151, "(…) alleges that Bulgaria has: failed to create a stable, equitable, favorable and transparent conditions for making the investment; (b) failed to provide fair and equitable treatment to Claimant's investment; (c) failed to provide to Claimant's investment the most constant protection and security; (d) subjected Claimant's investment to unreasonable measures; (e) breached contracts with PCL; and (t) subjected Claimant's investment to measures having an effect equivalent to expropriation (...)".

initial stage of the investment regarding the shareholding structure, while the applicant maintained that it was not under any obligation to disclose to the Bulgarian government the identity of the company's shareholders.

The Tribunal held that "(…) this may be acceptable in some cases but not under the present circumstances in which the state's approval of the investment was required as a matter of law and dependant on the financial and technical qualifications of the investor. If a material change occurred in the investor's shareholding that could have an effect on the host state's approval, the investor was, by virtue of the principle of good faith, obliged to inform the host state of such change. Intentional withholding of this information is therefore contrary to the principle of good faith. In consideration of the above and in light of the *ex turpi causa* defence, this Tribunal cannot lend its support to Claimant's request and cannot, therefore, grant the substantive protections of the ECT (…)"[74].

In the case at issue, the court held that a false statement (or rather a fraudulent statement) is prohibited in the light of international public policy.[75]

The arbitral tribunal stressed that: "(…) the claimant had indeed

[74]Plama Consortium Ltd. v. Republic of Bulgaria, op. cit., para. 152.

[75]Plama Consortium Ltd. v. Republic of Bulgaria, op. cit., para. 141.

committed fraud having 'represented to the Bulgarian government that the investor was a consortium-which was true during the early stages of negotiations" but then "failed deliberately to inform (the) Respondent of the change in circumstances" when the investor was left as a single individual without the necessary financial resources (…)".[76]

Specifically, the arbitral tribunal stated that, although Bulgaria had not requested such information, the claimant was aware of new facts for which there was an obligation to disclose arising from the principle of good faith.[77]

Therefore, the ICSID tribunal highlighted how the investor had placed itself in the position of "deliberate concealment amounting to fraud, calculated to induce Bulgarian authorities to authorize the transfer of shares to an entity that did not have the

[76]Plama Consortium Ltd. v. Republic of Bulgaria, op. cit., para. 142.

[77]Plama Consortium Ltd. v. Republic of Bulgaria, op. cit., para. 144 "(…) finds that Claimant's conduct is contrary to the principle of good faith which is part not only of Bulgarian law-as indicated above at paragraphs. 135-136- but also of international law-as noted by the tribunal in the Inceysa case. The principle of good faith encompasses, *inter alia*, the obligation for the investor to provide the host state with relevant and material information concerning the investor and the investment. This obligation is particularly important when the information is necessary for obtaining the state's approval of the investment (…)".

financial and managerial capabilities required (…)".[78]

Furthermore, the arbitral tribunal highlighted how Plama had then found itself involved in "deceitful conduct that is in violation of Bulgarian law" and that, granting protection under the ECT "to the claimant's investment would be contrary to the basic notions of international public policy, that a contract obtained by wrongful means (fraudulent misrepresentation) should not be enforced by a tribunal (…) on the basis of the *maxim nemo auditor propriam turpitudinem allegans* (…)".[79]

Considering such a requirement implicit in a multilateral investment treaty such as the ECT, the Plama Tribunal held that "unlike a number of Bilateral Investment Treaties, the ECT does not contain a provision requiring the conformity of the investment with a particular law. This does not mean, however, that the protections provided for by the ECT cover all kinds of investments, including those contrary to domestic or international law"[80].

The ECT, unlike many BITs, does not contain a so-called legality clause, the arbitral tribunal, like others,[81] inferred the existence of

[78]Plama Consortium Ltd. v. Republic of Bulgaria, op. cit., para. 134.

[79]Plama Consortium Ltd. v. Republic of Bulgaria, op. cit., para. 135.

[80]Plama Consortium Ltd. v. Republic of Bulgaria, op. cit., para. 138.

[81]Yaung Chi Oo Trading Pte. Ltd. v. Government of the Union Myanmar, ASEAN Case No. ARB/01/01, award, 31 March 2003, para. 58: "(…)

an implicit requirement parallel to the express clause providing for the legality of the investment, considering however that one of the objectives of the treaty is the strengthening of the rule of law in the field of energy emissions.
Therefore, the tribunal held that the ECT "should be interpreted in a manner consistent with the aim of encouraging respect for the rule of law (…) which means that it cannot apply to investments made contrary to law".
In conclusion, the court established that the false declaration of the investor, even if it did not vitiate the consent to arbitrate the dispute, constituted however a basis capable of excluding the application for inadmissibility given the implicit requirement, derived from the interpretation of the ECT, of the legality of the investment in order to obtain the protection granted by the treaty. Fraud remains in fact an obstacle to the recognition of such protection as it falls within the violations of international public order, in light of the Latin *maxim nemo auditor propriam turpitudinem allegans*.[82]

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general rule that for a foreign investment to enjoy treaty protection it must be lawful under the law of the host state (...)".

[82]Inceysa Vallisoletana S.L. v. Republic of El Salvador, op. cit., para. 138-146.

The Incesya Vallesoletana S.L. v. Republic of El Salvador case

The relevant arbitration in Plama, in Incesya Vallesoletana S.L. v. Republic of El Salvador case involved false statements in a tender procedure about obtaining a contract for the installation of a mechanical inspection system for the related vehicles.[83]

[83]Incesya Vallisoletana S.L. v. Republic of El Salvador, op. cit., para. 103-104, 105, 108: "(…) analysis of the arguments and evidence presented by the parties, in their written and oral submissions, allows this Tribunal to decide that the financial statements submitted by Inceysa with its tender in the Bid did not reflect the real financial condition of the Claimant, as the information contained in them is not correct. Inceysa did not present its real financial condition and that during the Bid it made false statements concerning its true financial condition (…) during the proceedings, both in the written and oral submissions, it was proven that the financial statements for fiscal years 1997 to 1999 presented by Inceysa with its tender in the Bid considerably differ from the financial statements filed by it with the Commercial Registry in Spain, pursuant to Spanish legislation on the matter. The differences between the two sets of financial statements are notable because the statements for the fiscal years 1997 to 1999 filed with the Spanish Commercial Registry show losses for the Claimant, while the financial statements for the same fiscal years enclosed with Inceysa's tender in the Bid show earnings (...) was fully demonstrated before this Tribunal that in the bidding process, Inceysa did not mention at all the supposed consolidation of these financial statements or the existence of Kira, S.A (…)".

The investor argued that the host state had unlawfully expropriated its investment and the government as defendant argued that Incesya Vallesoletana S.L had acted fraudulently since it was not entitled to invoke protection under the BIT between Spain and El Salvador.[84]

Thus, the arbitral tribunal made misleading conclusions about the investor based on circumstances that the company falsely induced the host state to believe that its partner was a public entity with the necessary background. Also, the tribunal found that false financial information, false statements and offers regarding the financial capacity necessary to meet the relevant terms of the contract led the tribunal to state that: "(...) respect for the law is a matter of public policy not only in El Salvador but in any civilized country. If this tribunal declares itself competent to hear the disputes between the parties it would completely ignore the fact that, above any claim of an investor, there is a meta-positive provision that prohibits attributing effects to an act done illegally (…) art of Salvadorian law (...) as stated by the arbitrators in the Incesya case, include the *maxim nemo auditor propriam turpitudinem allegans* (…) a manifestation of the "clean hands doctrine", which the tribunal used to affirm that

[84]Agreement for the Reciprocal Promotion and Protection of Investments signed between the Republic of EI Salvador and the Kingdom of Spain of 23 April 1996.

"benefit(s) from an investment effectuated by means of one or several illegal acts" cannot be granted (…) lack of jurisdiction "since its investment cannot benefit from the protection of the BIT (…) the existence of the clause "in accordance with the law" in Article III of the BIT in force between El Salvador and Spain was a clear manifestation of a reference to international public order to exclude from international protection investments made in violation of the laws of the contracting states (…) fraud under the *maxim nemo auditor propriam turpitudinem allegans* and, on the basis of the *maxim ex dolo malo non oritur action* (an action cannot be based on fraud) (…) foreign investor cannot seek to benefit from an investment effectuated by means of one or several illegal acts and, consequently, enjoy the protection granted by the host state, such as access to international arbitration to resolve disputes, because it is evident that its act had fraudulent origin and, as provided by the legal maxim nobody can benefit from its own fraud (…) not possible to recognize the existence of rights arising from illegal acts, because it would violate the respect for the law which, as already indicated, is a principle of international public policy (…)"[85].

[85]Incesya Vallisoletana S.L. v. Republic of El Salvador, op. cit., para. 249, 252. Fraport A.G. v. The Republic of the Philippines, op. cit., Dissenting Opinion di Bernardo Cremades, para. 40: "(…) gross illegality there may also be other reasons for the inadmissibility of a claim. In some cases, for

It has been noted from the previous statements a complete lack of jurisdiction respecting the dispute due to the lack of a specific investment.

The Phoenix Action Ltd. v. Czech Republic case

In Phoenix Action Ltd. v. The Czech Republic case we noted that the investor agreed in some types of illegal actions: "(…) the failure to terminate the freeze, the failure to terminate the document seizure, the violation of the obligation to accord fair and equitable treatment" as well as for unlawful expropriation (…)" the host state.

The respondent government preliminarily contested that jurisdiction was based on the fact that Phoenix was in fact a *post facto* fake Israeli company (Von Krause, 2009).

Thus, the Tribunal stated that: "(…) international mechanism of protection of investment through ICSID arbitration cannot be to protect investments made in violation of the laws of the host state. The protection of foreign investments made in accordance with the laws of the host state or investments not made in good

example, the principles of good faith and public policy may bar a claim. Both good faith and international public policy were important in Inceysa Vallisoletana S.L. v. Republic of El Salvador. International public policy barred the claims in World Duty Free v. The Republic of Kenya (…)".

faith, obtained for example through misrepresentations, concealments or corruption, or amounting to an abuse of the international ICSID arbitration system. In other words, the purpose of international protection is to protect legal and bona fide investments (...)[86] conformity of the establishment of the investment with the national laws (…) is implicit even when not expressly stated in the relevant BIT (...)"[87].

Denying jurisdiction which is in contrast with the approach which denies the admissibility of the action to the merits phase where the treaty does not contain the legality clause, which appears not to conform to this type of approach, motivates the terms of judicial economy from a procedural point of view.[88]

Some initial conclusions, comments on misrepresentations and fraud

From the jurisprudence of the previous paragraphs, the phenomenon of corruption as well as of fraud and misrepresentations to material facts by the investor induce the

[86]Phoenix Action Ltd. v. Czech Republic, op. cit., para. 100.

[87]Phoenix Action Ltd. v. Czech Republic, op. cit., para. 101. Gustaf F. W. Hamester Gmb Hamp Co. KG v. Republic of Ghana, op. cit., para. 123-124.

[88]Phoenix Action Ltd. v. Czech Republic, op. cit., para. 104.

host state to act in a way that is detrimental to its own interests.[89] Fraud is not the same as corruption and/or omissions of a necessary and sufficient party from the acts involved that prevent an arbitral tribunal from fraudulent conduct.[90]

Fraud is connected with good faith as noted: "(...) parties to deal honestly and fairly with each other, to represent their motives and purposes truthfully, and to refrain from taking unfair advantage[91] (...) certainly some manifestations of fraud, particularly those that might conceal illegal activities such as corruption and money laundering, are, with no doubts, condemned by international public policy (…)" (Cremades, Cairns, 2004).

Fraud is found with the arbitrator in investment matters by resorting to false statements that are related to the transaction presented in an arbitration proceeding context as present in false

[89]Incesya Vallisoletana S.L. v. Republic of El Salvador, v. Republic of El Salvador, op. cit., para. 102-128: "(...) of intentionally deceiving someone in order to gain an unfair or illegal advantage (financial, political or otherwise) (…)". https://www.transparency.org/glossary/term/fraud. Accessed on 15.12.2024.

[90]Incesya Vallisoletana S.L. v. Republic of El Salvador, op. cit., para. 143.

[91]Phoenix Action Ltd. v. Czech Republic, op. cit., para. 107: "(…) contractual field, good faith means absence (…) and artifice during the negotiation and execution of instruments that gave rise to the investment, as well as loyalty, truth and intent to maintain the equilibrium between the reciprocal performance of the parties (…)".

and knowingly mistaken documents before a litigation in court (Hanoutiadou, 2003). Fraud in international arbitration is explained by national laws, international conventions, arbitration case law and general principles of international law that punish the annulment of contracts obtained and national courts that refuse to know and implement the relevant arbitral awards tainted by fraud.[92] Landmarks that we see in the Treaty of Lisbon as well as the OECD Anti-Bribery Convention include provisions that require complete and accurate financial records with the aim of countering fraudulent transactions, such as money laundering or counterfeiting.[93]

[92]Australian International Arbitration Act 1974 par. 19 ("(…) an award is in conflict with the public policy of Australia if it was induced or affected by fraud (...)"); Belgian Judicial Code, Art. 1704(2)(a) and (3) (a)-(c) ("(…) an arbitral award can be set aside if it was obtained by fraud or it is contrary to public policy (...)"); India Arbitration and Conciliation Act 1996 §§ 34(2)(b)(ii), 48(2)(b) ("(…) for the avoidance of any doubt (…) an award is in conflict with the public policy of India if the making of the award was induced or affected by fraud or corruption (...)"); Netherlands Arbitration Act of 1986, Art. 1068; New Zealand Arbitration Act of 1996, Art. 36(3) ("(…) award is in conflict with the public policy of New Zealand if it was induced or affected by fraud (...)"; United States Federal Arbitration Act, 9 U.S.C. par. 10(a)(1).

[93]United Nation Convention Against Transnational Organized Crime, 29 September 2003, Art. 6, 2225, UNTS 209; International Convention for the

From a jurisprudential point of view, we recall the Phoenix Action Ltd. v Czech Republic case, where the court stated that: "(…) purpose of the international mechanism of protection of investment through ICSID arbitration cannot be to protect investments made in violation of the laws of the host state. (…) International protection is to protect legal and *bona fide* investments (...)"[94].

In the Plama Consortium Ltd. v. Republic of Bulgaria case the ICSID tribunal stated that: "(...) fraudulent misrepresentations are prohibited by international public policy (...)"[95] as well as in the Incesya Vallesoletana v. Republic of El Salvador case the tribunal stated: "(...) fraudulent misrepresentation in an auction procedure for a government contract constituted a violation of a "principle of international public policy (…)".[96]

Suppression of Counterfeiting, 20 April 1929, 112 LNTS 395.

[94]Phoenix Action Ltd. v. Czech Republic, op. cit., para. 100.

[95]Plama Consortium Ltd. v. Republic of Bulgaria, op. cit., "(…) investment was obtained by deceitful conduct (…) contrary to the basic notion of international public-policy that a contract obtained by wrongful means (fraudulent misrepresentation) should not be enforced by the tribunal (...)".

[96]Incesya Vallesoletana S.L. v. Republic of El Salvador, op. cit., para. 246, 247, 248, 249, 252: "(...) manifestation of said international public policy, which demonstrates the clear and obvious intent of the signatory states to exclude from its protection investments made in violation of the internal laws of each of them (…) uncontroversial that respect for the law is a matter

From a doctrinal point of view Cremades and Cairns noted that: "(…) fraud has not been the subject of the same degree of international cooperation and rule-making as bribery and money laundering (…) some steps have been taken to combat this kind of misconduct, particularly with respect to fraudulent record keeping that might facilitate or conceal corruption, money laundering or other crimes (…)" (Cremades, Cairns, 2004).

It is immediately clear that a relative international and transnational public order is in conflict with corruption and fraud.[97] These are crimes where: "(...) integrity of international business" through "pernicious macro-economic effects, including the distortion of competition and securities markets (…)" affects economic growth.

The unclean hands in the case of fraud as well as in corruption for foreign investors ends with a decision where the lack of

of public policy not only in El Salvador, but in any civilized country. If this tribunal declares itself competent to heat the disputes between the parties, it would completely ignore the fact that, above any claim of an investor, there is a meta-provision that prohibits attributing effects to an act done illegally (…)".

[97]Report of United Nations Commission on International Trade Law, 21 June 1985, para. 297, UN Gaor Supp. N. 17, Annex I, UN Doc. A/40/17: "(…) public policy is made up of fundamental principles of law and justice in substantive as well as procedural respects (…) corruption, bribery and fraud are universally prohibited (…)".

jurisdiction of the court on the case that violates the legality clause that remains contained in the BIT[98] and according to the law that is part of a BIT the host states refer to the domestic legislation in the host state stating that the insertion is not in accordance with the law. It does not also consider the treaty and the legality clause that is present in the treaty where fraud remains an obstacle that falls within the violations of international public order as well as in the general principle of *nemo auditor propriam turpitudinem allegans*.[99] Fraud thus conflicts with transnational public order. Fraud issues are also decided not only in a general manner, but specifically within the context of the inadmissibility of the action.[100]

[98]Fraport AG v. The Republic of the Philippines, op. cit.

[99]Inceysa Vallisoletana v. Republic of El Salvador, op. cit., para. 138-146.

[100]Phoenix Action Ltd. v. Czech Republic, op. cit., para. 104: "(…) establishment of the investment with the national laws (…) is implicit even when not expressly stated in the relevant BIT (…)". Gustaf F. W. Hamester Gmb Hamp Co. KG v. Republic of Ghana, op. cit.,, para. 123-124, 133-134: "(…) investment will also not be protected if it is made in violation of the host state's law (as elaborated, e.g. by the tribunal in Phoenix) These are general principles that exist indipendently of specific language to this effect to the treaty (...) number of Bilateral Investment Treaties, the ECT does not contain a provision requiring the conformity of the investment with a particular law. This does not mean, however, that the protections provided for by the ECT cover all kinds of investments, including those contrary to

(Follows). Problems related to fraud and corruption

In relation to fraud and corruption, arbitrators are faced with difficult offences that prove the cooperation of the parties. Thus, the burden and the standard of proof that is sufficient for the facts and the terms that apply in the cases of fraud and corruption are established in international law. The procedure in common law legal systems imposes rules that are more stringent with regard to the admission of evidence (Evensen, 1955; Sandifer, 1975; Jolowicz, 2000).

Evidence is declared admissible and the precise probative value is part of the different forms of evidence that are constitutive, documentary or oral (Jolowicz, Howard, 2000). Civil law legal systems are part of restrictive rules as regards the relative admissibility of evidence that accompanies the different typologies in civil law systems that attribute a different weight (Feller, 1935; Ginsburg, Bruzelius, 1965).

In international courts, documentary evidence is admitted as the rule and oral evidence as an exception (Simpson, Fox, 1959). The admissibility of evidence before international courts is in

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domestic or international law (...) the Bulgarian government that the investor was a consortium-which was true during the early stages of negotiations (…) fail deliberately to inform (the) respondent of the change in circumstances (…)".

accordance with the approach used in countries with civil tradition, avoiding a restrictive approach to the admissibility of evidence (Lauterpacht, 1931).

One recalls the old Mavrommatis Palestine Concessions case, according to which the Permanent Court stated from an evidentiary point of view that: "(…) the Court, whose jurisdiction is international, is not bound to attach to matters of form the same degree of importance which they might possess in municipal law (…)".[101]

The International Court of Justice (ICJ)[102] as well as international courts such as ICSID,[103] WTO panels (Palmeter, Mavroidis, 1999) and ICTY have adopted a relative attitude towards questions that are evidentiary related to evidence.

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[101]PCIJ, Mavrommatis Palestine Concessions (Grece v. United Kingdom), PCIJ Reports, 1924, Series A, No. 2, p. 12. ICJ, Case concerning legality of use of force (Yugoslavia v. Belgium), request for the indication of provisional measures, order of 2 June 1999, dissenting opinion of judge Kreca and of vice-President Weeramantry, para. 29 and 39.

[102]ICJ, Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain) (New Application: 1962), (second fase), 5 February 1970, in I.C.J. Rep., 1970, para. 65, 98 and the Separate Opinion of judge Fitzmaurice.

[103]Asian Agricultural Products Ltd v. Sri Lanka, ICSID Case No. ARB/87/3, award, 27 June 1990. Tradex v Albania (1999) 14 ICSID Review-FILJ 197, 220-221; ICSID Arbitration Rules, rule 34 (1): http://www.worldbank.org/icsid Accessed on 15.12.2024.

As regards the evidence (Amerasinghe, 2011) it weighs more on international proceedings where the *onus probandi* is inspired by the general principle of *actori incumbit probatio*. In this way, the courts impose a claim to establish the facts that are founded in their favor thus making a certain statement not able to offer probative support where the adverse inference considers the circumstances that are not proven as unfounded.[104]

The evidence brought by any party as proof for the relevant facts is based on the recognition and application of international courts according to the *actori incumbat probatio*. It includes the standard of proof that is connected with the burden of proof at a minimum level that is sufficient to prove a certain fact as burden of proof given the fact that the standard norm differs between

[104]Because the concepts of evidential and persuasive in common law systems are part of the burden of proof. The evidential is also used as the duty of passing the judge and puts the appellant on the fact that he obliges him to produce evidence that is sufficient: "(...) raise an issue as to the existence or non-existence of a fact in issue (...)". The persuasive also has the notion of legal as well as the risk of losing the question that is part of the object being formulated. Thus, it is underlined that the burden lies on the defendant and establishes the relevant defence. See also: ICJ, Temple of Preah Vihear (Cambodia v. Thailand), 15 June 1962, I.C.J. Rep. 1962, para. 26. In this latest case before the ICJ Thailand presented its claim as a counterclaim and the parties are based on assertions of fact and disputes resulting in a burden of proof.

common law and civil law systems.

As for common law systems, proving civil actions as balance of probabilities (Tapper, 1999) and according to the conviction of the judge, intime convinction, freie richterliche Überzeugung in civil law systems (Frowein, 1992; Hanotiau, 1994; Reiner, 1994) in proceedings before international bodies, there is actually no clear standard. Indeed we can say that there are standards that are certainly probative and find application in judicial proceedings of an international nature (Amerasinghe, 2011; Liakopoulos, 2021).[105]

The first standard is part of the *prima facie* evidence where the minimum level of proof does not include the presentation of supporting evidence that leads to the rejection of the claim.[106]

[105]See: ITLOS, M/V "Saiga" (No 2), 120 ILR 143, 220, 222 (Separate Opinion di Wolfrum) (ITLOS, 1999) is affirmed that: "(…) beyond reasonable doubt, which requires a high degree of cogency, and preponderance of evidence (...) Chamber of Appeals dell'ICTY on the results of the Trial Chamber. In the Prosecutor v. Tadić case, the Appeals Chambers (…) standard to be used when determining whether the Trial Chamber's factual finding should stand is that of unreasonableness, that is, a conclusion which no reasonable person could have reached (…) is only where the evidence relied on by the Trial Chamber could not reasonably have been accepted by any reasonable person that the Appeals Chamber can substitute its own finding for that of the Trial Chamber (…)".

[106]Golshani v. Iran, 29 Ir-USCTR 78, 116 (1993); Pomeroy v. Iran, 2 Ir-

Another standard is proof and necessity beyond reasonable doubt, as well as proof in a convincing manner as a standard that is based on the preponderance of evidence. Continuing with the application to some international tribunals the preponderance of evidence and the balance of probabilities are now a reality to an evidentiary system.[107]

We are talking about standards that are part of international proceedings where the evidence is not easy to the exclusive control of a state. The standard of preponderance appears not dissimilar to the *prima facie* standard.[108]

The standard of preponderance of evidence recognized by Sir Hersch Lauterpacht in the Norwegian Loans case, states that: "(…) the degree of burden of proof (…) to be adduced ought not to be so stringent as to render the proof unduly exacting (…).[109]

The 'preponderance of evidence' is similar to the fifth possible

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USCTR 372, 382 (1983); Batchelder, 22 ILR 864, 866 (Italy-US CC, 1954); Kazazi, above n 60, 327-328.

[107]Land, Island and Maritime Frontier Dispute [1992] ICJ Rep, para. 351, 506; Pereira Associates, Inc v. Iran, 5 Ir-USCTR 198, 230, 231 (1984) and the Separate Opinion of Mosk.

[108]Armed Activities, (DRC v. Uganda), CR 2005/3, 12 April 2005, para. 25-26 (Philippe Sands).

[109]ICJ, Certain Norwegian Loans (France v. Norway), 6 July 1957, I.C.J. Rep. 1957 (dissenting opinion of judge Lauterpacht), parr. 34-39.

standard, namely the granting to the judge of a discretionary power to determine whether the evidence produced by the parties is 'sufficient' to satisfy the burden of proof (…)".[110] The applicable standard of proof, where international tribunals apply their own tests, is different according to the facts and the circumstances of each case.[111]

The burden and standard of proof refers to the hypotheses of corruption and fraud. In such a case, the burden of proof continues to be on the party alleging fraud and corruption (Redfern, 1994).[112] The court uses various techniques to shift the

[110]ICJ, Oil Platforms (Islamic Republic of Iran v. United States of America), 6 November 2003, I.C.J. Rep., 2003, para. 134.

[111]Iran-U.S. Claims Tribunal, in the Rockwell International Systems Inc. v. Government of the Islamic Republic of Iran case, Iran-USCT. Sentence N. 438-430, 5 September 1989: "(...) evidence must be recognized as satisfactory basis to grant a claim where proof of the facts underlying the claim presents extreme difficulty and an inference from the evidence can reasonably be drawn (…)". Asian Agricultural Product Ltd. (AAPL) v. Sri Lanka, op. cit., para. 56: "(…) proof of a fact presents extreme difficulty, a tribunal may thus be satisfied with less conclusive proof, i.e. *prima facie* evidence (...)".

[112]According to Redfern: "(…) all international arbitral tribunals require each party to prove the facts upon which it relies to support its case (…)". Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka, ICSID Case No. ARB/09/2, award, 31 October 2012, para. 56: "(…) a general

burden of proof. In addition, the court orders its own initiative and finds the existence of other serious indications of fraud, corruption during the proceedings (Cremades, Carins, 2003).
Direct evidence of fraud and/or corruption is difficult for arbitral tribunals. In fact, they adopt a different approach by providing the tribunal with evidence that is sufficient for the fraud and corruption. Hypotheses such as arbitrators asking the opposing party for relevant facts that rebut the evidence for illegal activities thus shifting the burden of proof towards this party.[113]

principle of placing the burden of proof upon the claimant (…) The term actor in the principle *onus probandi actori incumbit* is not to be taken to mean the plaintiff from the procedural standpoint, but the real claimant in view of the issue involved. Hence, with regard to the proof of individual allegations advanced by the parties in the course of proceedings, the burden of proof rests upon the party alleging the fact (...)". UNCITRAL Arbitration Rules, Art. 24(1) "(…) each party should have the burden of proving the facts relied on to support its claim or defence (…)". ICDR International Arbitration Rules, Art. 19(1) "(…) each party shall have the burden of proving the facts relied on to support its claim or defense (...)".

[113]Liechtenstein v. Germany, ICC Award N. 6497, Final Award 1994 ("The "alleging party" has the burden of proof (to demonstrate the existence of bribery) (…) The "alleging party" may bring some relevant evidence for its allegation, without these elements being really conclusive. In such case, the arbitral tribunal may exceptionally request the other party to bring some counter evidence, if such task is possible and not too burdensome. If the other party does not bring such counter evidence, the arbitral tribunal may

The standard of proof faced with fraud and corruption depends on the applicable law. It is relevant and requires a high level of proof[114] where the standard of proof in international arbitration approaches a preponderance of evidence test (Von Mehrem, 1996; Crivellaro, 2003; Petrochilos, 2004).[115]

The burden or not of proof that is applicable and determined by

conclude that the facts alleged are proven (Article 8 of the Swiss Civil Code) (…) the burden of proof is only to be made in special circumstances and for very good reasons (…)".

[114]EDF (Services) Limited v. Romania, ICSID Case No. ARB/05/13, Award 8 Oct. 2009: "(...) seriousness of the accusation of corruption in the present case, considering that it involves officials at the highest level of the Romanian government at the time, demands clear and convincing evidence (…)".

[115]"(…) clear and convincing evidence was needed to declare the agreement invalid because of corruption (…) most generally applied in international commercial arbitration is probably the "preponderance of evidence". This standard reflects the general view that the proponent of a position must do more than create an equilibrium between its position and that of its opponent to prevail (…)". According to Petrochilos: "(…) a contrary provision of law applicable on the merits, the standard of proof is the balance of probability or conviction in time (…)". ICDRI International Arbitration Rules, Art. 20(6):
https://www.icdr.org/sites/default/filesdocument_repositoryICDR_Rules.pdf
Accessed on 15.12.2024 ("(…) shall determine the admissibility, relevance, materiality and weight of the evidence offered by any party (...)");

the tribunal under the applicable law determines the weight and credibility accorded to the evidence presented. It also shows the discretion that is granted to arbitrators who have at their disposal direct and unambiguous evidence for the demonstration of fraud and corruption (Scherer, 2012). Thus, arbitral tribunals are confronted with indirect evidence of fraud and corruption. This deemed sufficient to satisfy the applicable standard of proof (Lamm, Pham, and others, 2010).

In the Metal-Tech case the tribunal affirmed that regarding: "(…) allegations of corruption, the burden should be shifted to the Claimant to establish that there was no corruption. Rules establishing presumptions or shifting the burden of proof under certain circumstances, or drawing inferences from a lack of proof are generally deemed to be part of the *lex causae*. In the present case, the *lex causae* is essentially the BIT, which provides no rules for shifting the burden of proof or establishing presumptions (…) has relative freedom in determining the

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UNCITRAL Arbitration Rules, Art. 25(6): "(…) arbitral tribunal shall determine the admissibility, relevance, materiality and weight of the evidence offered (...)"); IBA Rules of Evidence, Art. 9.1 ("(…) the Arbitral Tribunal shall determine the admissibility, relevance, materiality and weight of evidence (...)"); ICSID Arbitration Rules, Rule 34(1) ("(…) the tribunal shall be the judge of the admissibility of any evidence adduced and of its probative value (…)").

standard necessary to sustain a determination of corruption (...)[116] determine on the basis of the evidence before it whether corruption has been established with reasonable certainty (…) corruption is by essence difficult to establish and that it is thus generally admitted that it can be shown through circumstantial evidence (...)" claimant was unable to substantiate its contention that actual services had been carried out for legitimate purposes in return for those payments (…) (Rosell, Prager, 1999; Crawford, 2002; Crivellaro, 2003)[117].

It is credible that the court has given more weight to indirect evidence. In such a case the party demonstrates the objective difficulties for direct evidence to be adequate (Lamm, Pham and others, 2010).

Arbitral parties also pose procedural techniques such as delaying evidence. Courts assert that evidence is available but is not considered by the party who refuses to produce it and bring it before an arbitration panel (Sandifer, 1939; Cheng, 1987; Reiner,

[116]Metal-Tech Ltd. v. Republic of Uzbekistan, op. cit., para. 238.

[117]See also the case: ICC No. 8891 (1998): "(…) "1. The inability of the agent to provide evidentiary proof of his activity; 2. The very short duration of the agent's involvement in the contract; 3. Remuneration in the form of a commission based on the value of the contract and 4. A particularly high rate of commission (…)".

1994; Craig, Park, Paulsson, 1998; Sharpe, 2002).[118]
In the Iran-U.S. the Tribunal claims: "(…) it is an accepted principle that an adverse inference[119] may be drawn from a party's failure to submit evidence likely to be at its disposal (…) (Holtzmann, 1992; Brower, Brueschke, 1998)[120] (i) the party seeking an adverse inference has presented all the relevant

[118]According to Sandifer: "(…) less satisfactory evidence than would be required in municipal procedure if the opposing party fails to produce evidence in his possession, or if in the face of some proof he fails to substantiate his own claim by any acceptable evidence. In other words, a party cannot simply assert or deny a proposition, and then rest his case upon a technical rule throwing the burden of proof on the other party without running a risk of adverse inference being drawn from his failure to produce evidence (…)". Cheng affirms that: "(…) the absence of evidence in rebuttal is an essential consideration in the admission of *prima facie* evidence. Where the opposite party can easily produce countervailing evidence, its non-production may be taken into account in weighing the evidence before the Commission (…) as established by *prima facie* evidence, coupled with the adverse presumption arising from the non-production of available counter-evidence, is thus sufficient to create a moral conviction of the truth of an allegation (…)". Reiner affirms that: "(…) a party does not comply with its obligations in the arbitration, for instance by refusing to produce certain documents requested by the other side and/or by the arbitrators, this will not affect the burden and standards of proof, but the arbitral tribunal will draw (adverse) conclusions, from that party's behaviour, that is to say, i twill take the behaviour into account for the weighing of the evidence and

evidence available to him and, in any event, has presented sufficient evidence of fraud or corruption to support the prosecution's case; (ii) the party against whom the adverse inference is made has refused to produce evidence to which he had plausible access and which he would have been required to produce; (iii) the inference drawn is consistent with the facts presented and relates logically to the evidence which could have been produced but not produced (…)" (Brower, Brueschke, 1998). Evidence as a result of fraud and corruption is scarce since it cannot coerce international arbitration as the use of inferences are adverse and often fundamental for the party

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for deciding whether the required standard of proof has been reached, i.e. whether the burden of proof has been discharged by the concerned party (…)". Craig, Park, Paulsson affirms that: "(...) party which refuses to comply with an order (…) should be advised that arbitrators are likely to conclude that the document in questions unfavorable to that party (…)".

[119]Rule 34(3) of ICSID Arbitration Rules: "(…) shall cooperate with the Tribunal in the production of the evidence and in the other measures provided for in paragraph (2). The Tribunal shall take formal note of the failure of a party to comply with its obligations under this paragraph and of any reasons given for such failure (…)". Europe Cement Investment & Trade S.A. v. Republic of Turkey, ICSID Case No. ARB(AF)/07/2, award, 13 August 2009.

[120]Arthur J. Fritz & Co. v. Sherkate Tavonie Sherkathaye Sakhtemanies (STSS), Award No. 426- 276-3, 30 June 1989.

claiming that the evidence in international arbitration is made to satisfy the evidentiary burden (Lamm, Pham and others, 2010).

Host state violations and national legislation

From the case law set out in the previous paragraphs, it has been understood that for the clean hands doctrine, the national legal system of the host state must be simultaneously recognized also by arbitration tribunals in order to try to avoid and/or investigate the possibility of corruption and fraud.[121]

Violations in the form of national laws include matters such as corruption, fraud, false declarations for the development of investment, that are limited in the sectors of activity by foreign investors who can also intervene (Llamazon, Sinclair, 2015). These are investments that are legal but obtained by illegal means.[122]

For example, in the Fraport AG Frankfurt Airport Services Worldwide v. The Republic of the Philippines case the tribunal held that: "(…) the investor knew that under Philippine law foreign citizens were prohibited from intervening in the management, operation or control of utilities (…) by secretly

[121]Fraport Ag Frankfurt Airport Services Worldwide v. Philippines, op. cit.

[122] Fraport Ag Frankfurt Airport Services Worldwide v. Philippines, op. cit.

arranging the management and control of the project in a manner which it knew to be inconsistent with Philippine law, it thereby forfeited the right to protection of that investment (…) deliberate violations of national constitutional and legal provisions generally, provided they are not a *de minimis* violation, permit an arbitral tribunal to deny protection to an investment under the relevant treaty (…)".[123]

A similar issue was decided by the arbitral tribunal in the Tokios Tokelés v. Ukraine case.[124] The Ukrainian legislation decided for an investment of about 6.5 million dollars that was under its controlled in the period 1994-2002. Tokios Tokelės complained to the Ukrainian authorities for serious actions directed against Taki Spravy, that violated the obligations of a bilateral investment treaty in force between Ukraine and Lithuania (Ukraine-Lithuania BIT).[125]

[123] Fraport Ag Frankfurt Airport Services Worldwide v. Philippines, op. cit.

[124]Tokios Tokelés v. Ukraine, op. cit.

[125]Para. 3: "(…) contends that, beginning in February 2002, the Respondent engaged in a series of unreasonable and unjustified actions against Taki spravy that adversely affected the Claimant's investment. The Claimant alleges that governmental authorities of the Respondent: (1) conducted numerous and invasive investigations under the guise of enforcing national tax laws; (2) pursued unsubstantiated actions in domestic courts, including actions to invalidate contracts entered into by Taki spravy; (3) placed the assets of Taki spravy under administrative arrest; (4) unreasonably seized

The respondent state took a position about the preliminary objections and requests of jurisdiction where Tokios Tokelės placed the relevant investment.

The arbitrator relied as usual on Article 25 of the ICSID Convention since the tribunal had jurisdiction that arose from an investment. Thus, the parties relied on a broad discretion which stated: "(…) of an investment they wish to bring to ICSID (…) precisely because the Convention does not define "investment", it does not purport to define the requirements that an investment should meet to qualify for ICSID jurisdiction (…) large measure of discretion to determine for themselves whether their transaction constitutes an investment for the purposes of the Convention (…)" (Lamm, Cohen Smutny, 1996)[126]. This discretion has been translated into the adoption of the relevant BIT.

We do not forget another parameter that was represented by the BIT between Lithuania and Ukraine.

Specifically, in art. 1 it was declared about a: "(...) kind of asset invested by an investor of one contracting party in the territory of the other contracting party in accordance with the laws and regulations of the latter (…) requirement in Article 1(1) of the

financial and other documents (…)".

[126]Fedax N.V. v. Republic of Venezuela, ICSID Case No. ARB/96/3, award, 11 July 1997, para. 22.

Ukraine-Lithuania BIT that investments be made in compliance with the laws and regulations of the host state is a common requirement in modern BITs (…)" (Schreuer, Malintoppi, Reinisch, Sinclair, 2009; Liakopoulos, 2019).

This position was also foreseen in the Salini Costruttori S.p.A and Italstrade S.p.A v. Marocco case, where it was held that: "(…) Bilateral Treaty from protecting investments that should not be protected, particularly because they would be illegal (...)[127] accordance with the Ukraine laws and regulations' (…) must emerge in the context of the treaty as a whole and in the light of its objects and purposes (…) respondent does not allege that the Claimant's investment and business activity-advertising, printing, and publishing-are illegal *per se*.

In fact (…) governmental authorities of the respondent registered the Claimant's subsidiary as a valid enterprise in 1994, and, over the next eight years, registered each of the Claimant's investments in Ukraine, as documented in twenty-three Informational Notices of Payment of Foreign Investment (…) respondent now alleges that some of the documents underlying these registered investments contain defects of various types, some of which relate to matters of Ukrainian law (…)"[128].

[127]Salini Costruttori S.p.A and Italstrade S.p.A v. Kingdom of Morocco, op. cit., para. 46.

[128]Salini Costruttori S.p.A and Italstrade S.p.A v. Kingdom of Morocco, op.

The defendant's claims are confirmed by administrative procedures which excluded the investment: "(...) the basis of such minor errors would be inconsistent with the object and purpose of the Treaty (…) the defendant's registration of Tokios Tokeles' investments, according to a logic of acquiescence, demonstrated that the investment in question was made in accordance with the laws and regulations of Ukraine (…)".

In practice, the violation of the law of the host state was checked, which meant that the investor was the person aware of the conduct contrary to the legal system of the state of investment to decide and carry out an illegal conduct that further burdened the violation.

The tribunal in the Fraport case reported that: "(...) the question is whether the investment is made in accordance with the law of the host state, considerable arguments may be made in favor of construing jurisdiction in a more liberal way which is generous to the investor[129] (…) recognized that there may be circumstances in which the law of the host state may not be entirely clear and mistakes may have been made in good faith at the time of the acquisition of the investment (…) such circumstance may subsequently be taken into account by the court in the merits of

cit., para. 47.

[129]Fraport Ag Frankfurt Airport Services Worldwide v. Philippines, op. cit., para. 396.

the utility company dispute, in particular for the purposes of calculating damages, if any, in favor of the investor (…)".[130] Thus, the arbitral tribunal checked the relevance of the relevant provisions that were violated by the investor.

The Fraport AG Frankfurt Airport Services Worldwide v. The Republic of the Philippines case

Fraud cases and cases involving violations of the law of the host state qualify and involve forms of illegality under the national criminal legislation of the Philippine Criminal Court. It looked at the shell company thus excluding the exercise of management control over some cases of public services such as airport terminals that were the bases, grounds of the dispute.

The arbitration procedure was based on the BIT in force of Germany and Philippines. The protection called on the German investor to agree with the investment that is operated precisely in the Philippines, namely the host state starting from 1999 in the sector of construction and management of airports. The related investment consisted of the participations acquired by a Philippine company (PIATCO) for the related construction of an international terminal the Manila Ninoy Aquino III in other

[130]Fraport Ag Frankfurt Airport Services Worldwide v. Philippines, op. cit., para. 397.

Philippine companies that participated in the capital with numerous loans that are granted to the aforementioned companies. The Philippine government has annulled the concession contract that was concluded between the Philippine Department of Transport and Communications and Fraport.

The respondent complained of a violation of Philippine law in the restrictions that were imposed on foreigners who complied with the exercise of economic activities in the public utilities sector, such as the so-called anti-dummy law.

The jurisdiction of the arbitral tribunal *de quo* stated that: "(…) afforded by the BIT at issue do not extend to investments made in violation of Philippine law (…) respondent refers to the "limited nature" of the BIT's application and contends that the Claimant's investment falls outside of the BIT's expressly limited scope because it was not made in compliance with Philippine law. In brief, the respondent avers that the Claimant's investment was not 'accepted' in accordance with the laws of the Philippines, in the words of Article 1(1) of the BIT (...)"[131].

A secret arbitration agreement between shareholders and Fraport ensured management control over the joint venture that was awarded the concession to build and operate the terminal, namely

[131]Fraport Ag Frankfurt Airport Services Worldwide v. Philippines, op. cit., para. 285.

the Manila Ninoi Aquino International Airport[132] where the BIT in force between Germany and the Philippines "explicitly and reiteratedly" required that the investment could obtain the protection afforded by the BIT, which complied with the host state law.[133]

[132]Fraport Ag Frankfurt Airport Services Worldwide v. Philippines, op. cit., para. 125, 355: "(…) that ("the secret shareholder agreements") consist of critical evidence establishing that Fraport sought to exercise managerial control over PIATCO and thereby knowingly orchestrated its investment in flagrant violation of the ADL (…) Tribunal's concern here is not with Fraport's quantitative (...) with the secret shareholder agreements. In the context of the internal Fraport documents, the secret shareholder agreements show that Fraport from the outset understood, with precision, the Philippine legal prohibition but believed that if it complied with it, the prospective investment could not be profitable. So it elected to proceed with the investment by secretly violating Philippine law through the secret shareholder agreements. These agreements evidence that Fraport planned and knew that its investment was not "in accordance" with Philippine law (...) jurisdictional question before this Tribunal, which is seized of an international investment dispute, is not a determination of a crime but whether an economic transaction by a German company was made "in accordance" with Philippine law and thus qualifies as an "investment" under the German Philippine BIT. Even assuming, however, that the "preponderance of evidence" test which applies in civil law must yield in the instant case to a "beyond a reasonable doubt" test because the subject of

The appellant relied on the anti-dummy legislation that limited the intervention of foreign investors in the management, administration or control of a Philippine public utility. Furthermore, he concealed the agreement that violated the relevant legislation.[134] Such a conduct was in conformity with the laws and regulations of the Philippines under the relevant BIT. In such a case, the tribunal admitted that it did not have jurisdiction *ratione materiae* due to the lack of consent of disputes that are related to such investments.[135]

In fact, the tribunal stated, in this regard, that: "(…) the question is whether the investment is in accordance with the law of the host state, considerable arguments may be made in favour of construing jurisdiction *ratione materiae* in a more liberal way which is generous to the investor (…) the law in question of the host state may not be entirely clear and mistakes may be made in good faith. In this case, the comportment of the foreign investor,

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the 'in accordance' inquiry is a Philippine criminal statute, this is a case in which *res ipsa loquitur*. The relevant facts, all of which are found in Fraport's own documents, are incontrovertible (…)".

[133]Fraport AG v. The Republic of the Philippines, op. cit., para. 398.

[134]Fraport AG v. The Republic of the Philippines, op. cit., para. 401.

[135]Fraport AG v. The Republic of the Philippines, op. cit., para. 40: "(…) claim to have made an investment "in accordance with law" and the tribunal lacked jurisdiction *rationae materiae* (…)".

as is clear from its own records, was egregious and cannot benefit from presumptions which might ordinarily operate in favour of the investor (…) compliance with the host state's laws is an explicit and hardly unreasonable requirement in the treaty and its accompanying Protocol (…)"[136].

In the same case, judge Cremades stated in a dissenting opinion that: "(…) principle of legality in investment arbitration, like the principles of *pacta sunt servanda* and good faith, applies equally to both parties (…) very purpose of investment arbitration is to determine the legality of the conduct of the host state and the investor under the applicable law (…) it is not uncommon for BITs to include in the definition of investment some reference to domestic law and regulation similar to the language of the Philippines-Germany BIT[137] (...) these provisions is not to condition the right to arbitrate on the minute compliance by the investor at all times and in all respects with the domestic law and regulation of the host state (…) Host state might escape responsibility for unfair or expropriatory acts because the investor did not comply with domestic regulation relating to the expression of corporate names. Such an argument has been raised before an international arbitral tribunal and was properly rejected

[136]Fraport AG v. The Republic of the Philippines, op. cit., para. 404.

[137]Fraport AG v. The Republic of the Philippines, op. cit., and the dissenting opinion of judge Bernardo M. Cremades.

because to exclude an investment on the basis of such minor errors would be inconsistent with the object and purpose of the Treaty (...)[138] legality of the Claimant's conduct is a jurisdictional issue, and the legality of the respondent's conduct a merits issue, then the respondent host state is placed in a powerful position (…) an approach does not respect fundamental principles of procedure (…) the legality of the investor's conduct is a merits issue (…) in accordance with the laws and regulations of the host state (...) is limited to determining whether the type of asset is legal in domestic law (…) the proper interpretation of Article 1(1) of the Philippines-Germany BIT in accordance with the principles of the Vienna Convention produces exactly this result referred to the Tokios Tokeles v. Ukraine case as an example of a state's reliance on a trivial breach of local law to challenge the jurisdiction of the arbitral tribunal. What of an example at the other extreme, of an investor that has engaged in systematic fraud or corruption? The recent award in Inceysa Vallisoletana S.L. v. Republic of El Salvador (ICSID Case No. ARB/03/26, Award of August 2, 2006) involved systematic fraud in securing a contract with the Republic of El Salvador, (…), and the tribunal held that there was no jurisdiction on a number of grounds, including that the investment was not made in accordance with the laws of El

[138]Tokios Tokeles v. Ukraine, op. cit., para. 83-86.

Salvador. (…) a case of gross illegality the Host State will almost certainly have a defence on the merits, and the claim will be dismissed. In cases of gross illegality there may also be other reasons for the inadmissibility of a claim. In some cases, for example, the principles of good faith and public policy may bar a claim. Both good faith and international public policy were important in Inceysa Vallisoletana S.L. v. Republic of El Salvador. International public policy barred the claims in World Duty Free v. The Republic of Kenya (ICSID Case Nv ARB/00/07, Award of October 4, 2006) (…) illegality might have consequences for jurisdiction peculiar to the circumstances of a particular dispute, as for example, where the illegality connects the dispute to events before the treaty entered into force, and therefore deprives the tribunal of jurisdiction *rationae temporis* (Empresas Lucchetti, S.A. and Lucchetti Peru, S.A. v. Republic of Peru, ICSID Case No. ARB/03/4, Award of February 7, 2005) (…) For these reasons, I consider that the decision of the majority in this arbitration is not only contrary to the terms of Article 1(1) of the Philippines Germany BIT, but it is also fundamentally wrong in its approach to illegality as a matter of principle (…)" (Shirlow, Gore, 2022)[139].

[139]Tokios Tokeles v. Ukraine, op. cit., para. 36-41.

The relation between unclean hands and law

The relation between unclean hands and law has to do with the admissibility and jurisdiction of the concepts of judges that are applied by arbitral tribunals as causes of exception of jurisdiction that often get confused (Wehland, 2017).

Jurisdiction defines the following: "(…) power of the tribunal to hear the case[140] (…) the term "competence" is often used alternatively to the notion of jurisdiction (Born, 2014). The jurisdiction of a tribunal is generally based on the consent of the parties to the dispute. Objections to jurisdiction could be described in relation to the conditions affecting the parties consent to have the tribunal decide the case (…) whether it is appropriate for the tribunal to hear (the case) (Waibel, 2015)[141] (…) the suitability of the claim for adjudication on the merits (…)" (Douglas, 2009).[142]

[140]Waste Management v. Mexico, ICSID Case No. ARB(AF)/98/2, award, 2 June 2000, Dissenting Opinion of judge Keith Highet, para. 58.

[141]Waste Management v. Mexico, op. cit., para. 58: "(…) admissibility concerns the power of a tribunal to decide a case at a particular point in time in view of possible temporary or permanent defects of the claim (…)".

[142]Abaclat and Others v. Argentina, ICSID Case No. ARB/07/5 (ex Giovanna A Beccara and Others v. The Argentine Republic), award 28 October 2011, Dissenting Opinion, Georges Abi-Saab, para. 18. Methanex v. US (UNCITRAL), Partial Award of 7 August 2002, para. 109, 122-125. Oil

In this regard, we recall. the opinion of Brownlie who stated: "(...) objection to the admissibility of a claim invites the tribunal to dismiss (or perhaps postpone) the claim on a ground which, while it does not exclude its authority in principle, affects the possibility or propriety of its deciding the particular case at the particular time (…)".[143]

Admissibility and jurisdiction are fundamental issues for an international judgment that is outside the access to the relevant litigation. The final goal of the procedure is to be part of the concepts that remain with variable way to formulate preliminary objections (Fontanelli, Tanzi, 2017).

In an international litigation the relevant arguments that have to do with jurisdiction and admissibility are solved with preliminary objections. When the first party acts to convince the court to proceed to the rejection of the case- before the merit has addressed the concepts and the creativity that provide a good opportunity to objections- the jurisdiction of the court and the admissibility of a claim are affected. Jurisdiction and

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Platforms (Islamic Republic of Iran v. United States of America), op. cit., para. 29. Northern Cameroons (Cameroons v United Kingdom), preliminary objections, decision 2 December 1963, ICJ, Rep. 1963. ICJ, Nuclear Tests (Australia v. France), Judgment, 1974 ICJ Reports 253, 20 December 1974, para. 46 and 49.

[143]Waste Management v. Mexico, op. cit., para. 59.

admissibility of a conceptual definition to an investment arbitration is a problem that governs every attempt that seeks to resolve the case.

In practice, we speak of an admissibility test. The jurisdiction states with certainty that the two institutes are logical in their content. The jurisdiction concerns the judicial forum that deals with the application. The decisions on jurisdiction and admissibility aim to answer the applications. Thus, the parties grant the tribunal the power to decide on a specific application. The application prevents the tribunal from exercising jurisdiction over the case. The tribunals already know both the concepts and practices of the inadmissibility of a missing jurisdiction.

The jurisdiction is assessed in a necessary and preliminary manner. The grounds for inadmissibility revoke from the parties the subjects and rules that are invoked. The tribunal cannot have the obligation to raise exceptions *proprio motu*[144] and the parties

[144]Lance Larsen v. the Hawaiian Kingdom, PCA Case No. 99-001, UNCITRAL 1976 Rules, award, 5 February 2001, para. 927-933. Hochtief AG v. Argentina, ICSID Case No. ARB/07/31, jurisdiction, decision, 24 October 2011, para. 5: "(…) the ICJ, for example, rules on admissibility include such matters as the rules on the nationality of claims and the exhaustion of local remedies. The ICJ may have jurisdiction to decide whether State A had injured corporation B in violation of international law; but it may be that the claim actually filed is inadmissible because it has been

lose the right to invoke a phase of the procedure (Amerasinghe, 2011).[145] Thus, the jurisdiction of the tribunal defines the *res judicata*. Consequently, the inadmissibility of the claim does not become a *res judicata* and overcomes the claim that is proposed after the remedies have been exhausted for a waiting period that has expired.

The possibility of review of decisions (Paulsson, 2005) and the conclusions of the jurisdiction are subject to a supervisory body that authorizes and accepts the majority of arbitration panels that have not exceeded their powers by arriving at claims that are not final. Thus, in evidence every relevant question of jurisdiction to admissibility affects every logical sequence that has to do with the analysis of the tribunal and the assignment of the burden of proof between the parties (Shany, 2015; Fontanelli, Tanzi, 2017).[146]

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brought by the wrong state, or because local remedies have not yet been exhausted. But if no objection is raised on such grounds, the court will not raise the matter *proprio motu* (…)".

[145]"(…) an objection relating to recevabilité may be waived or the opportunity to raise it lost, whereas a defect in jurisdiction can technically never be cured (…)".

[146]According to Shany: "(…) distinction may help us better understand the way courts exercise judicial power and the legal interests of relevant constituencies affected as they do so (...)". See also the case: 18 January 2017, the ICSID court in Supervision y Control v. Costa Rica of 18 January

The tribunal in the Hochtief Aktiengesellschaft v. Argentine Republic case affirmed: "(…) jurisdiction is an attribute of a tribunal and not of a claim, whereas admissibility is an attribute of a claim but not of a tribunal[147] (…) concept of admissibility refers to the varied reasons that a tribunal, although it has jurisdiction, may decline to hear a case or a claim (…)".

2017, para. 268, which is affirmed that: "(…) the conclusions on jurisdiction, not those on admissibility (Ibid., para. 268). There are some exceptions to this. First, the assertion that arbitral tribunals are in all cases required to assess *ex officio* the existence of the grounds for their jurisdiction appears to contravene the relevant ICSID and UNCITRAL rules. These, by establishing a time limit for jurisdictional objections clearly imply that after a critical moment the court should even ignore an objection raised *ex parte*, let alone raise it *proprio motu*. See also in argument: Waguih Elie George Siag and Clorinda Vecchi v. The Arab Republic of Egypt, ICSID Case No. ARB/05/15, jurisdiction, decision of 11 April 2007, Partial Dissenting Opinion of Professor Francisco Orrego Vicuña and Partial Dissenting Opinion of Professor Francisco Orrego Vicuña, 11 April 2007, para. 138ss: "(…) the burden of proof, it could operate differently with regard to the demonstration of the grounds of jurisdiction or those of admissibility (…) the investor must demonstrate the existence of the jurisdictional requirements; the state must demonstrate that a claim on existing jurisdiction is inadmissible (...)". Phoenix Action Ltd v. Czech Republic, op. cit., para. 58-64: "(…) jurisdiction rests on the existence of certain facts, they have to be proven (not just established *prima facie*) at the jurisdictional phase (…)". Rusoro Mining Ltd. v. Bolivarian Republic of

The relevant jurisdiction concerns the power that adjudicated at the tribunal the consent of the state that put to arbitration the dispute concerning the admissibility that concerned the application (Heiskanen, 2014).

The ICSID in the Hochtief v. Argentina case affirmed: "(…) jurisdiction is an attribute of a tribunal and not of a claim,

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Venezuela, ICSID Case No. ARB(AF)/12/5, award, 22 August 2016, para. 350ss: "(…) relevant to jurisdiction or admissibility, but stated that in both cases the state would have to provide decisive evidence (…) another often cited distinction is the different regime for reviewing legal determinations – that is say whether the decision is reviewable or voidable -, on the one hand, in contrast to decisions on admissibility-immune from review (...) distinction finds little textual rooting in the ICSID system, in which the standard for nullification is a clear excess of power or a serious deviation from a fundamental procedural rule (ICSID Convention, Article 52). An incorrect jurisdictional decision could fall within the scope of this standard, but so could a determination of admissibility, provided that the threshold of critical severity is reached (…)". Venezuela Holdings, B.V., et al. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/07/27, Decision on Annulment, 9 March 2017, para. 110: "(…) Committee accepts that there is some force in the argument advanced by Venezuela that matters of jurisdiction may call for a more rigorous approach than other grounds for annulment, simply because a tribunal ought not to be allowed to exercise a judicial power it does not have (or vice versa). The Committee also accepts that there is weight in the Mobil Parties' contention that questions of admissibility may require to be approached in a different way from

whereas admissibility is an attribute of a claim but not of a tribunal (…)".[148]In the Micula v. Romania case was also stated, "(…) objection to jurisdiction goes to the ability of a tribunal to hear a case while an objection to admissibility aims at the claim itself and presupposes that the tribunal has jurisdiction (...)"[149].
The admissibility is an issue that takes into account the relative

questions of jurisdiction for the purposes of the annulment scheme laid down in Article 52 of the ICSID Convention. It is plain on the face of it that the reference in Article 52(1)(b) to a tribunal having "manifestly exceeded its powers" fits most naturally into the context of jurisdiction, in the sense that it covers the case where a tribunal exercises a judicial power which on a proper analysis had not been conferred on it (or vice versa declines to exercise a jurisdiction which it did possess (...)". TECO v. Guatemala Holdings, LLC v. Republic of Guatemala, ICSID Case No. ARB/10/23, Decision on Annulment of 5 April 2016, para. 215: "(...) the Committee wishes to clarify that it cannot accept Guatemala's theory according to which a tribunal's incorrect decision on jurisdiction can never survive annulment because any excess of jurisdiction is necessarily manifest (...)". Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic, ICSID Case No. ARB/07/26, jurisdiction, decision, 12 December 2012, para. 117: "(…) the ICSID system, a decision stating that a claim lacks admissibility may be brought before an annulment committee based on one of the grounds listed in Article 52(1) of the Convention and in particular when the claimant alleges that the tribunal had "manifestly exceeded its powers" (lett. b). This feature of ICSID practice renders both the distinction wrong in theory and useless in

jurisdiction of the tribunal (Reinish, 2017) as noted in the case of the arbitrators in Erhas Dis Ticaret Ltd. Sti v. Turkmenistan: "(…) the concept of admissibility refers to the varied reasons that a tribunal, although it has jurisdiction, may decline to hear a case or a claim (…)".[150]

The Tribunal in Bureau Veritas v. Paraguay noted that: "(…) in the event that the Tribunal does have jurisdiction, the claim is admissible (...)"[151]. Thus, a certain distinction can be understood

practice (…)".

[147]Hochtief Aktiengesellschaft v. Argentine Republic, ICSID Case No ARB/07/31, op. cit., para. 90. 1101 Erhas Dis Ticaret Ltd. Sti, et al. v. Republic of Turkmenistan, PCA Case No. 2013-27, Separate Declaration Stanimir A. Alexandrov, 19 May 2015, para. 5.

[148]Hochtief Aktiengesellschaft v. Argentine Republic, op. cit., para. 90.

[149]Micula v. Romania, ICSID Case No. ARB/05/20, Jurisdiction and Admissibility, decision, 24 September 2008, para. 63.

[150]Erhas Dis Ticaret Ltd. Sti, et al. v. Republic of Turkmenistan, PCA Case No. 2013-27, Separate Declaration di Stanimir A. Alexandrov, 19 May 2015, para. 5.

[151]Bureau Veritas, Inspection, Valuation, Assessment and Control, BIVAC B.V. v. Republic of Paraguay, ICSID Case No. ARB/07/9, Decision on Objections to Jurisdiction, 29 May 2009, para. 132: "(…) issues that divide the parties (...) related to two issues: the issue of jurisdiction, namely whether the Tribunal has jurisdiction over "Claimant's" claims under (the relevant BIT); and the issue of admissibility, namely whether in the event that the Tribunal does have jurisdiction, the claim is admissible (…)".

which also brings with it the relative consequences (Reinisch, 2017). Jan Paulsson noted in relation to the distinction that decisions on jurisdiction are contrary in the case of rulings of inadmissibility (Paulsson, 2005).

The difference between competence and jurisdiction has to do with admissibility between the Convention and the ICSID arbitration rules as well as its additional facility rules (Heiskanen, 1994; Laird, 2005). The relative silence is explained and based on the answers to the admissibility questions that are outside the ICSID Convention (Steingruber, 2014).

Arbitral tribunals have the power to decide on admissibility objections and proceedings under the ICSID Convention and the proceedings of the additional facility rules.[152] The ICSID Convention did not use the term "admissibility" but "competence" of the ICSID tribunals as well as jurisdicition of the Centre.[153] The distinction between admissibility and

[152]South West Africa (Ethiopia v. South Africa; Liberia v. South Africa), preliminary objections, decision, 18 July 1966, I.C.J. Rep 1966, para. 112. Methanex v. US, op. cit., para. 126.

[153]See Article 41 Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 18 March 1965, 575 U.N.T.S. 159 ("(1) The Tribunal shall be the judge of its own competence. (2) Any objection by a party to the dispute that that dispute is not within the jurisdiction of the Centre, or for other reasons is not within the competence

jurisdiction is, however, not precise in ICSID arbitration (Reinisch, 2017).

The *ratione materiae* of the Centre according to Article 25 is limited: "(…) legal disputes arising directly from an investment (…) contracting states or any constituent subdivision or agency of a contracting state designated to the Centre by that state (…) nationals of another contracting state (...)"[154].

In ICSID cases the jurisdiction based on BITs and the annulment committee in Mitchell v. Congo,[155] the ICSID award in Malaysian Historical Salvors v. Malaysia[156] (…) the Salini-light-

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of the Tribunal, shall be considered by the Tribunal which shall determine whether to deal with it as a preliminary question or to join it to the merits of the dispute (…)".

[154]Article 25 ICSID Convention: "(...) jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a contracting state (or any constituent subdivision or agency of a contracting state designated to the Centre by that state) and a national of another contracting state which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally (…)".

[155]Patrick Mitchell v. Democratic Republic of the Congo, ICSID Case No. ARB/99/7, Application for Annulment of the Award, decision, 1st November 2006.

[156]Malaysian Historical Salvors, op. cit.

test (Schreuer, Malintoppi, Reinisch, Sinclair, 2009)[157] (…) three objective criteria of (i) a contribution, (ii) a certain duration, and (iii) an element of risk (…)"[158].

The ICSID Convention and most of ILAs do not use the term admissibility. The tribunals refer to the concept of admissibility that have refused to exercise jurisdiction and decides to abstain in certain requests.

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[157]Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco, op. cit., para. 52: "(…) considers that investment infers: contributions, a certain duration of performance of the contract and a participation in the risks of the transaction (...) reading the Convention's preamble, one may add the contribution to the economic development of the host state of the investment as an additional condition (…)". Electrabel S.A. v. Republic of Hungary, ICSID Case No. ARB/07/19, jurisdiction, decision, Applicable Law and Liability, 30 November 2012, para. 5.43. Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka, op. cit., para. 306; GEA Group Aktiengesellschaft v. Ukraine, ICSID Case No. ARB/08/16, award, 31 March 2011, para. 151; KT Asia Investment Group B.V. v. Republic of Kazakhstan, ICSID Case No. ARB/09/8, award, 17 October 2013, para. 173; Saba Fakes v. Republic of Turkey, ICSID Case No. ARB/07/20, award, 14 July 2010, para. 110: "(…) that the criteria of (i) a contribution, (ii) a certain duration, and (iii) an element of risk, are both necessary and sufficient to define an investment within the framework of the ICSID Convention (…)".

[158]Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco, op. cit., para. 53.

Admissibility is an important thing in situations that verify corruption and any form of illegality. It realizes the investment and the clauses in accordance with host state law. These are part of BITs as requirements of jurisdiction and admissibility.[159]

Legality clauses are considered as limits to jurisdiction that are imposed by the parties themselves as a requirement of legality that involves a question of admissibility (Moloo, Khachaturian, 2011; Schill, 2012; Obersteiner, 2014).

The concepts of jurisdiction and admissibility determine the rejection of the claim which is independent of the merits and is differentiated from the concepts of the objection of admissibility which constitutes: "(...) plea that the tribunal should rule the claim to be inadmissible on some ground other than its ultimate merits (…) plea that the tribunal itself is incompetent to give any ruling at all whether as to the merits or as to the admissibility of the claim (…)" (Fitzmaurice, 1995).[160]

[159]Inceysa Vallisoletana S.L. v. Republic of El Salvador, op. cit., para. 190; Fraport AG Frankfurt Airport Services Worldwide v. Philippines, op. cit., para. 401; Ioannis Kardassopoulos v. The Republic of Georgia, ICSID Case No. ARB/05/18, jurisdiction, decision, 6 July 2007, para. 182.

[160]For the admissibility see Art. 79 (1) of the Regulation of the ICJ which affirms that: "(…) the respondent to the jurisdiction of the Court or to the admissibility of the application, or other objection the decision upon which is requested before any further proceedings on the merits, shall be made in

Jurisdiction logically precedes the related question of admissibility which is decided only if the relevant jurisdiction is ascertained. Thus, jurisdiction concerns that the arbitration agreement and the scope of state's consent to arbitrate (…) admissibility is related to a specific claim or counterclaim (…)" (Steingruber, 2014; Heiskanen, 2014).[161]

The test of ascertainment and objection refers to the jurisdiction and admissibility that asks if the party objects. The tribunal qualifies the jurisdiction and the related claim thus objecting the

writing as soon as possible, and not later than three months after the delivery of the Memorial (…)".

[161]Steingruber affirms that: "(…) arbitration practice shows that courts occasionally struggle to clearly distinguish the two concepts (regarding the US Supreme Court's use of the notion of "arbitrability" as it encompasses both questions of jurisdiction and admissibility, and are not always clear in their use of relevant terminology (Burlington Resources Inc. v. Ecuador, ICSID Case No. ARB/08/5, jurisdiction, decision, 2 June 2010, para. 315–318, 336–340) (…)". See also in argument: Pope and Talbot Inc. v. Canada (UNCITRAL), Preliminary Motion by Canada, decision, 24 February 2000, para. 18; Western NIS Enterprise Fund v. Ukraine, ICSID Case No. ARB/04/2, Order, 16 marzo 2006; Teinver v. Argentina, ICSID Case No. ARB/09/1, jurisdiction, decision, 21 December 2012, para. 135; Philip Morris v. Uruguay, (ICSID Case No. ARB/10/7), jurisdiction, decision, 2 July 2013, para. 148. Bayindir v. Pakistan, (ICSID Case No. ARB/03/29), Decision on Jurisdiction of 14 November 2005, para. 87; Philip Morris v. Uruguay, op. cit., para. 142).

qualification of inadmissibility considering that the logic is based on the objection. Thus, the: "(…) claim could not be brought to the particular forum seize (…) it is inappropriate for the tribunal to exercise its adjudicative power in any circumstances (…) is inappropriate for the tribunal to rule upon the specific claim or counterclaim on the merits (...) claim should not be heard at all (or at least not yet) (…)".[162] The question is thus defined and is related to admissibility.

The distinction between admissibility and jurisdiction is based on the advisory opinion. It is also in accordance with international law of the unilateral declaration of independence in respect of Kosovo as it was noted in the case of ICJ, where the Court affirmed: "(…) the fact of having jurisdiction over a certain case submitted to it did not mean that it was obliged to make a ruling (...) the court has recalled many times in the past that Article 65 of its Statute, which provides that the court may give an advisory opinion (…) should be interpreted to mean that the court has a discretionary power to decline to give an advisory opinion even if the conditions of jurisdiction are met (...)"[163].

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[162] Bayindir v. Pakistan, (ICSID Case No. ARB/03/29), op. cit.

[163]Accordance with international law of the unilateral declaration of independence in respect of Kosovo, Advisory Opinion, 22 July 2010, I.C.J. Rep., 2010, para. 415-416.

In the Northern Cameroon case the ICJ refused on grounds of inadmissibility to deal with legal issues which are devoid of practical implications.[164]

The distinction between admissibility and jurisdiction is also found in investment arbitration in Abaclat v. Argentina case, where it was stated that: "(...) a lack of jurisdiction *stricto sensu* means that the claim cannot at all be brought in front of the body called upon, a lack of admissibility means that the claim was neither fit nor mature for judicial treatment (...)[165] the question of jurisdiction concerns the power to judge, or whether or not an international tribunal is authorized to judge a case (Shany, 2015) (...) not only a judicial power to render a decision but also an obligation to do so and not a mere discretion (...) the question of admissibility would instead concern the possible refusal by the tribunal to exercise its jurisdictional power. Admissibility, therefore, denotes a right and not a duty to judge (...)" (Hohfeld,

[164]ICJ, Northern Cameroons (Cameroons v. United Kingdom), preliminary objections, decision 2 December 1963, op. cit., para. 15, 37: "(…) indicated that even if, when seized of an application, the court finds that it has jurisdiction, it is not obliged to exercise it in all cases. If the court is satisfied, whatever the nature of the relief claimed, that to adjudicate on the merits of an application would be inconsistent with its judicial function, it should refuse to do so (…)".

[165]Abaclat and Others v. Argentina, op. cit.

1913).

Admissibility and jurisdiction have legal effects that are different. They concern the *res judicata* (Paulsson, 2005)[166] where the immediate effect is the same[167] and the unlawful act by the investor is an exception. In this way, the host state as

[166]According to Paulsson: "(…) a challenge pertains to jurisdiction or admissibility, one should imagine that it succeeds: If the reason for such an outcome would be that the claim could not be brought to the particular forum seized the issue is ordinarily one of jurisdiction and subject to further recourse. If the reason would be that the claim should not be heard at all (or at least not yet), the issue is ordinarily one of admissibility and the tribunal's decision is final (…) whereas decisions that do not respect jurisdictional limits may be overturned, determination as to admissibility are final (...)". In Mobil Investments Canada Inc. and Murphy Oil Corporation v. Canada, ICSID Case No. ARB(AF)/07/4, decision on jurisdiction and admissibility, para. 207 and 209: "(…) a prior tribunal did not definitively decide on a claim, if that claim was put before it and the tribunal held that it possessed jurisdiction, the same claim based on the same cause of action cannot be advanced before a later tribunal (...) majority of the arbitration awards which discuss *res judicata*, as has already been shown, emphasize the need for a matter to have been "distinctly determined" before *res judicata* can apply (…)".

[167]Pac Rim Cayman LLC v. Republic of El Salvador, ICSID Case No. ARB/09/12, Decision on Jurisdictional Objections, 1 June 2012, para 2.10: "(…) respondent's jurisdictional objection based on abuse of process by the

defendant precludes the judgment (Kreindler, 2010).[168]
The host state in both cases is exempted from any liability that denies remedy. The BITs, thus, limits the protection that the treaty offers investments that are made according to national laws, i.e. the legality clause (Schill, 2012)[169] as we note in the Salini Costruttori SpA and Italstrade SpA v. Kingdom of Morocco case which stated: "(...) seeks to prevent the bilateral treaty from protecting investment that should not be protected, particularly because they would be illegal (…)".[170]

Claimant does not, in legal theory, operate as a bar to the existence of the Tribunal's jurisdiction; but, rather, as a bar to the exercise of that jurisdiction, necessarily assuming jurisdiction to exist (…)".

[168]According to Kreindler: "(…) investments are not protected by the ECT. Therefore, even if an arbitral tribunal were to find that a respondent committed an expropriation, such expropriation might not constitute an actionable breach of Article 13 ECT (…) the claimant and its investment could render a claim for ECT protection inadmissible. When the respondent failed to provide for fair and equitable treatment in breach of Article 10 ECT, the same consequences should follow (…)".

[169]"(…) term "investment" designates all categories of assets invested, after the coming into force of the present agreement, by a natural or legal person, including the government of a contracting party, on the territory of the other contracting party, in accordance with the law and the regulations of the aforementioned party (…)".

[170]Salini Costruttori SpA & Italstrade v. Kingdom of Morocco, op. cit., para. 112: "(…) good faith and legality cannot be incorporated into the definition

This is an interpretation that is accepted in a series of arbitral awards building a consolidated address.[171] The clause in accordance with the host state law is part of the text of a treaty. The arbitrators consider, in this regard, that the investment violates national laws and is not protected by the treaty (Dolzer, Screuer, 2008). The clean hands doctrine provides in accordance with host state law (Moloo, 2011)[172] that the host state attempts to invoke the clean hands defense. The ICSID tribunal has jurisdiction over the investor's request in accordance with the host state's positive law.

The concept: "(...) compliance with the law of the host state (...)" serves as a basis for addressing investments that through

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of Art 25(1) of the ICSID Convention without doing violence to the language of the ICSID Convention: an investment might be "legal" or "illegal", made in "good faith" or not, it nonetheless remains an investment. The expression "legal investment" or "investment made in good faith" are not pleonasms, and the expression "illegal investment" or "investment made in bad faith are not oxymoron" (…)".

[171]Tokios Tokelés v. Ukraine, op. cit., para 84. Metal-Tech Ltd. v. Republic of Uzbekistan, op. cit., Fraport AG Frankfurt Airport Services Worldwide v. Philippines, op. cit., Incesya Vallisoletana S.L. v. Republic of El Salvador, op. cit.

[172]Germany-Philippines BIT, Art.1(1): "(…) "investment" shall mean any kind of asset accepted in accordance with the respective laws and regulations of either contracting state (…)".

corruption and fraud are behaviors that violate the legal order of any host state. They serve as a guarantee against violations of a host state's national legislation (Llamazon, Sinclair, 2015).

Investors through clean hands have the right to protection. The tribunal as we have seen in the Incesya case interpreted the relative applicability in accordance with the law.[173]

The tribunal in the case *de quo* was the subject of controversy as it did not meet the requirements of legality in the applicable treaty.[174] The jurisdiction considers the investment that is not part of the consensus but is expressed in the contracting parties where the treaty seeks to resolve the dispute.[175]

In particular, the Incesya case relied on the BIT and the preparatory traveaux argued that: "(...) the parties to the (El Salvador-Spain) BIT were to exclude from the scope of application and protection of the Agreement disputes originating

[173]Inceysa Vallisoletana v. Republic of El Salvador, op. cit.

[174]Inceysa Vallisoletana v. Republic of El Salvador, op. cit., para. 248-252. The Spain-El Salvador BIT in art. III affirms that: "(…) each contracting party shall protect in its territory the investments made, in accordance with its legislation (…)".

[175]Inceysa Vallisoletana v. Republic of El Salvador, op. cit., para. 257: "(…) Inceysa's investment was made in a manner that was clearly illegal, it is not included within the scope of consent expressed by Spain and the Republic of El Salvador in the BIT and, consequently, the disputes arising from it are not subject to the jurisdiction of the Centre (…)".

from investments which were not made in accordance with the laws of the host state (…) the appellant had falsely presented himself in a bidding process for a government contract and, as a consequence of that finding, believed that he did not have jurisdiction since the investment (…) did not satisfy the requirement of legality established by the relevant BIT, the source of the consent to arbitrate the dispute (…)".[176]

In the Fraport case the BIT held that: "(…) explicitly and reiteratedly required that the investment, in order to obtain the protection afforded by the BIT, had to be made in accordance with the law of the host state (…)".[177]

In the Desert Line case[178] it was stated that: "(…) in accordance

[176]Inceysa Vallisoletana v. Republic of El Salvador, op. cit., para. 258.

[177]Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines, op. cit., para. 398.

[178]Desert Line Project LLC v. Republic of Yemen, ICSID Case No. ARB/05/17, award, 6 February 2008, para. 135: "(...) received government approval and, at the invitation of the Yemeni President, the company proceeded to enter into numerous contracts with the Yemeni government. However, no payment was made for the concluded contracts. Meanwhile, the subcontractor stopped work and Yemeni officials forced Desert Line to shut down its operations. The Yemeni armed forces, together with members of the local council and local tribes, confronted and threatened Desert Line personnel by opening fire with automatic weapons and removing the investor's equipment. Desert Line sought relief in municipal arbitration for

with law clauses are intended to ensure the legality of the investment by excluding investments made in breach of fundamental principles of the host state's law, e.g. by fraudulent misrepresentations (like in Incesya) or the dissimulation of true ownership (like in Fraport) (…) the tribunal found that the appellant's breach of that requirement meant that the investment was excluded from the scope of the consent to arbitrate the dispute and for that reason denied its jurisdiction (...)"[179].

The ICSID (Tirado, Page, Meagher, 2014) has considered that by denying jurisdiction the investment is illegal and does not perform in (...) conformity with the host state law (...) as required

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the moral damages claimed and obtained relief and an award was awarded in its favor. The Yemeni government, however, did not respect the award and actually interfered with its implementation. Finally, it forced Desert Line to sign a settlement agreement for a sum much lower than that obtained in arbitration, thus pushing Desert Line to submit a request to the ICSID, on the basis of the existing bilateral treaty between Oman and Yemen, complaining of an unfair and inequitable treatment' and the violation of the "minimum standard of treatment", including a denial of justice, by the Yemeni government (…)".

[179]Inceysa Vallisoletana, op. cit., para. 243: "(…) Inceysa acted improperly in order to be awarded the bid that made its investment possible and, therefore, it cannot be given the protection granted by the BIT. Sustaining the contrary would be to violate the aforementioned general principles of law which, as indicated, are part of Salvadoran law (…)".

by the relevant investment treaty (...) the treaties contain the so-called legality clause, arbitration jurisprudence is rather consolidated in concluding that illegal investments do not fall within the scope of the consent to arbitrate the dispute under the relevant IIA, and in considering themselves therefore lacking jurisdiction (Dudas, Tsolakidis, 2013) (...) This trend stabilizes investors who have been involved in unlawful acts under the relevant national law in order to secure a government contract, will probably lose outright the protection granted by the treaty to investments and with it the possibility of recovering damages always under that same treaty (...)" (Sinlapapiromsuk, 2013).

The investment treaty provides that investments are made according to the law of the host state. They are protected by the same treaty. If problems arise for the investments the tribunal has no jurisdiction to resolve the dispute. Arbitration practice[180] suggests that the clause that has provided for the relevant investment includes all the laws that have to do with the admission of the investment. Finding the legislation that concerns the admission of a foreign capital or other investments establishes both procedural and substantive precise conditions for

[180]Fraport AG Frankfurt Airport Services Worldwide v. Philippines, op. cit., Tokios Tokeles v. Ukraine, op. cit., Mytilineos v. Serbia and Serbia and Montenegro, UNCITRAL, Partial Award on Jurisdiction (8 September 2006) para. 151.

the admission of foreign investments. The legislations require that foreign investments are registered and approved. Thus, the violation violates the legality clause (Llamazon, Sinclair, 2015).

A common line of thinking for investments was that the foreign citizen was in violation of the laws of the host state where the investment had to be characterized as illegal *per se*[181] since the tribunal had to consider the jurisdiction according to the requests of the foreign investor who is in arbitration.[182]

This is an approach where the legitimacy that the investment acquires is in a suspensive condition because of the judicial power that brings to light the investment treaty. Thus, the tribunals have adopted an approach that limits the violations that have prevented access to jurisdiction and the hypotheses that they have actually presented: "(…) fundamental principles of the host state's law (...)[183] and the exceptions of legality (...) technical

[181]Tokios Tokelés v. Ukraine, op. cit., para. 86 cited in Mytilineos v. Serbia and Serbia and Montenegro, UNCITRAL, Partial Award on Jurisdiction (8 September 2006) para. 151.

[182]Alpha Projektholding Gmbh v. Ukraine, ICSID Case No. ARB/07/16, award, 8 November 2010, para. 294; Inmaris Perestroika Sailing Maritime Services Gmbh and Others v. Ukraine, op. cit., para. 145.

[183]LESI SpA and Astaldi, SpA v. People's Democratic Republic of Algeria, ICSID Case No. ARB/05/03, award, 12 November 2008, para. 83; Desert Line Project LLC v. Republic of Yemen, op. cit., para. 104; Rumeli Telekom AS and Telsim Mobil Telekomunikasyon Hizmetleri AS v. Republic of

violations or minor errors of the law of the host state (…)".[184]
The jurisdictional approach justifying the exception of illegality makes us understand that the consent of the host state to arbitral jurisdiction does not extend to the relevant investment disputes that are acquired for violations by the claimant under the law of the host state and the investment treaty that is part of it.[185]
International investment law gives effect to the general principles of law and good faith where the claimant has no profit from the unlawful actions.[186] It respects the integrity of the national law that has respected the host state.[187] The interpretative approach welcomes the definition of investment. The exception of illegality and the principle of good faith remains faithful to Art. 31, letter c) VCLT. In this way, the treaty interprets any rules that are relevant to the international law and applicable between the parties (Douglas, 2014; Hollis, 2020; Fitzmaurice, Merkouris, 2020).

Kazakhastan, ICSID Case No. ARB/05/16, award, 29 July 2008, para. 319.

[184]Tokios Tokelés v. Ukraine, op. cit., para. 86, Mytilineos Holdings, op. cit., para. 151-155 and 120.

[185]Phoenix Action, op. cit., para 106.

[186]Inceysa Vallisoletana, op. cit., para. 232-237 and 240-244; Phoenix Action, op. cit., para. 106.

[187]Fraport AG Frankfurt Airport Services Worldwide v. Philippines, op. cit., par. 402.

The practice aims at the state to find a solution that is alternative and based on the dissenting opinions. In the Fraport case it argues: "(...) the legality of the Claimant's conduct is a jurisdictional issue, and the legality of the Respondent's conduct a merits issue, then the respondent host state is placed in a powerful position (…)".[188] This finding requires justice to have a system that requires the investor's unlawful actions to be considered as equals as well as respecting what happens to the unlawful conduct of the host state.[189]

Exceptions of inadmissibility, protection of international public order and clean hands doctrine

In the field of investments there are no provisions to confirm their protection. The ICSID tribunal, for example, in the Plama case highlighted that the applicant obtained an investment by fraudulently omitting that the facts regarding management skills are considered under Bulgarian law as necessary to operate oil

[188]Fraport AG Frankfurt Airport Services Worldwide v. Philippines, op. cit., par. 403.

[189]Philip Gruslin v. Malaysia, ICSID Case No. ARB/99/3, award, 28 November 2000, para. 24-26; Incesya Vallesoletana S.L. v. Republic of El Salvador, op. cit., para. 190-191; Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines, op. cit., para. 334.

refineries.[190]

The tribunal addressed a multilateral treaty dealing with investments, namely the ECT and the legality clause. The tribunal, also, found that the applicant's claims were inadmissible since the investment in dispute did not comply with the law of the host state. According to the rules of international law the illegitimacy of the investment was determined by the approvals for the Bulgarian privatization that acquired a large part of the shares in Nova Plama. Such a conduct was incorrect and the tribunal declared that the investment of the national law i.e. of the host state: "(…) does not mean (…) that the protections provided for by the ECT cover all kind of investments, including those contrary to domestic or international law (…)".

The tribunal followed the path of the appellant who violated the general principles of law by being part of the principle *nemo auditor propriam turpitudinem allegans*. This principle confirms the:"(…) claimant, in the present case, is requesting the tribunal to grant its investment in Bulgaria the protection provided by the ECT (…) the tribunal has decided that the investment was obtained by deceitful conduct that is in violation of Bulgarian law. The tribunal is of the view that granting the ECT's protections to Claimant's investment would be contrary to the

[190]Plama Consortium Limited v. Republic of Bulgaria, op. cit., para. 99.

principle *nemo auditor propriam turpitudinem allegans* (…) a number of BITs, the ECT does not contain a provision requiring the conformity of the investment with a particular law. This does not mean, however, that the protection provided for the ECT cover all kinds of investments, including those contrary to domestic or international law (…) fundamental aim of the ECT is to strengthener the rule of law on energy issues (…) the ECT (…) requires to be interpreted in a manner consistent with the aim of encouraging respect for the rule of law. The arbitral tribunal therefore concluded that the substantive protection afforded by the ECT cannot cover illicit investments (…) on the decision rendered previously in Incesya and therefore concluded that there is a general principle of law according to which nobody can benefit from his own wrong (…)".[191]

The tribunal in Plama relied on the principle and the rationale that informed the clean hands doctrine.

We also see this opinion in the Phoenix Action case which states: "(…) this condition-the conformity of the establishment of the investment with the national laws-is implicit even when not expressly stated in the relevant BIT[192] (…) expressly included a norm according to the law (...) specified that the requisite "is

[191]Plama Consortium Limited v. Republic of Bulgaria, op. cit., para. 100.

[192]Phoenix Action Ltd., op. cit., para. 101.

implicit even when not expressly stated in the relevant BIT (…) states cannot be deemed to offer access to the ICSID dispute settlement mechanism to investment not made in good faith (…)"[193].

In the Hamester case, the tribunal implied that the treaties concerned investments that were covered by the treaty. According to the law the investment satisfied the requirement of legality: "(…) investment will not be protected if it has been created in violation of national or international principles of good faith; by way of corruption, fraud or deceitful conduct; if its creation itself constitute a misuse of the system of international investment protection under the ICSID Convention; or if it is made in violation of the host state law[194] (…) general principles that exist independently of specific language to this effect in the treaty (…) in illicit investments should always and in any case be denied international protection regardless of the presence of an express provision to that effect in the treaty being examined by the tribunal (…) in a so-called legality clause the problem, however, concerns how to import the anti-corruption and anti-fraud principles into the BIT regime and how they operate (…) the concept of international public order (so-called transnational

[193]Phoenix Action Ltd., op. cit., para. 102.

[194]Gustaf F.W. Hamester GmbH amp; Co KG v. Republic of Ghana, op. cit., para. 123.

public policy) that arbitrators are required to respect by virtue of the international nature of the disputes submitted to them as well as of the institutions to which they belong (…)" (Buchanan, 1988).[195]

In relation to foreign investment in the host state the fundamental principles recognized that international public policy took into account the prohibitions of bribery and fraud. Fraud and bribery were contrary to international public policy (Sinlapapiromsuk, 2013).[196]

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[195]Buchanan affirms that: "(…) public policy includes those standards or rules of a given state's domestic public policy that will also be applied by that state in an international context. Transnational public policy is said to represent the existence of an international consensus as to universal standards or accepted norms of conduct that must always apply and provide limitations to public as well as private international relationship and transactions. While transnational public policy is closely related to the international public policy of individual states, they are clearly distinct. The former is less restrictive, representing the common fundamental values of the world community, while the latter inevitably reflects a particular selfish character. In international investment arbitration, a forum that in a sense is not tied to a domestic jurisdiction, the bias of "localization" may be less evident and the arbitrator may be in a better position to ascertain and understand the needs of the international community and call upon notions of transnational public policy (…)".

[196]Sinlapapiromsuk affirms that: "(…) transnational public policy is

Arbitration jurisprudence deals with international investment as we noted in the World Duty Free case which stated: "(…) that bribery is contrary to the international public policy of most, if not all, states, or, to use another formula, to transnational public policy[197] (…) international consensus as to universal standards and accepted norms of conduct that must be applied in all fora (...)".

The Incesya Vallesoletana case is of the same line of thought. In particular, the ICSID tribunal regarding transnational public order stated that: "(…) function to preserve the values of the international legal system against actions contrary to it (...)"[198].

International arbitration tribunals have observed that binding rules of relevant transnational public law (Lalive, 1987) were part of the applicable law and the public international law

characterized by a certain ambiguity (…) transnational public order reflects global consensus around fundamental economic, legal, moral, political and social values; it can therefore be considered a collection of universal standards, shared norms and general principles widely accepted by the international community (...) rules have developed over time identifying international consensus around a particular issue. Consensus regarding the existence of transnational public policy rules derives from the convergence of national laws, international conventions, arbitration jurisprudence and academic commentaries (...)".

[197]World Duty Free, op. cit., para. 157.

[198]Inceysa Vallisoletana, op. cit., para. 245.

(Lamm, Pham and others, 2010).

Transnational public policy in investment matters, through the rules of public international law, governed the relevant dispute. Substantive rights gave rise to arbitration and international treaties, which are governed by international law. According to Art. 31, par. 3 (c) VCLT: "(…) relevant rules of international law are applicable in the relations between the parties (…)" (Hollis, 2020). In this regard, the ECT affirmed: "(…) applicable rules and principles of international law[199] and numerous BITs adopt the same language (…)" (Hollis, 2020; Fitzmaurice, Merkouris, 2020).[200]

In contrast, Art. 42 (1) of the ICSID Convention provides that tribunals shall decide disputes in accordance with the rules of international law.[201]

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[199]Energy Charter Treaty, signed on Lisbon on 17 December 1994, (entered into force on 16 April 1998), art. 26(6): https://www.italaw.com/sites/default/files/laws/italaw8641.pdf. Accessed on 15.12.2024.

[200]2004 U.S. Model BIT, Art. 30 (governing law): https://www.state.gov/documents/organization/117601.pdf. Accessed on 15.12.2024.

[201]Convention on the Settlement of Investment Disputes between States and Nationals of Other States, signed in Washington, 18 March 1965, (enterd into force on 14 October 1996), art. 42(1), 575 UNTS 159, (ICSID Convention). MTD Equity Sdn. Bhd & MTD Chile S.A. v. Republic of

In this regard, the Report of the Executives Directors on the ICSID Convention included and reinvigorated that: "(…) the term international law as used in this context should be understood in the sense given to it by Article 38(1) of the Statute of the ICJ, allowance being made for the fact that Article 38 was designed to apply to inter-state disputes (...)"[202]. International public order is distinct from public order which is referred to as truly international and/or transnational public policy.

Public order has some important characteristics such as: "(…) fundamental principles, pertaining to justice or morality, that the state wishes to protect even when it is not directly concerned; *lois de police*, rules designed to serve the essential political, social, or economic interests of the state (…) international obligations owed by a state towards other states or international

Chile, ICSID Case No. ARB/01/7, award, 25 May 2004, para. 86: "(…) Article 42(2) of the Convention is the relevant provision for determining the law applicable to the merits of the disputes between the parties. This article requires the tribunal to decide a dispute in accordance with such rules of law as may be agreed by the parties (…) being a dispute under the BIT, the parties have agreed that the merits of the dispute be decided in accordance with international law (…)".

[202]International Bank for Reconstruction and Development, Report of the Executive Directors on the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, 18 March 1965, para. 40.

organizations (…)" (Mayer, Sheppard, 2003).

These are concepts that are part of a domestic approach that varies from state to state and the national source of public order of an international nature comes from *lex fori*, that is, from the law that the tribunal is located in.[203] The related concept considers that the rules and principles belong and are part of the international public order and can be derogated as superior and binding by consensus since violations of public order are part of duties that do not recognize non-assistance (Hoffmeister, Kleinlein, 2013).

In the Inceysa case[204] it was held that: "(…) international public order as a subsidiary justification for allowing the defendant host state to invoke the defence of corruption to escape liability for breach of an investment treaty (…) to grant treaty protection to

[203]Fraport AG Frankfurt Airport Services Worldwide v. Philippines, op. cit., par. 405 and the dissenting opinion of judge Cremades ""(…) legality of the investment in investment arbitration has its analogy in international commercial arbitration in the validity of the contract. If the applicable law does not insist on the separability of the arbitration agreement from the main contract, then respondents quickly seek to subvert the arbitral process by challenging the validity of the main contract. Similarly, the phrase according to the laws and regulations of the host state might provide the Achilles Heel of investment arbitration if jurisdiction depends on the claimant passing a full legal compliance audit (…)".

[204]Incesya Vallisoletana S.L. v. Republic of El Salvador, op. cit.

an investor who has engaged in fraudulent conduct would violate international public order (…) consists of the "fundamental principles that constitute the very essence of the state (…) and respect for the law.[205] So we speak of a global application which[206]: "(...) comprises fundamental rules of natural law, principles of universal justice, *jus cogens* (…) international law, and the general principles of morality accepted by (…) civilized nations (...)"[207].

In the World Duty Free case, the objective norm of international public order, that was contrary to corruption, international conventions and arbitral awards, was checked by arguing that the contract was the subject of investigation through acts of corruption that allowed the state: "(...) relieve (it) itself from its

[205]Incesya Vallisoletana S.L. v. Republic of El Salvador, op. cit., para. 246.

[206]Int'l Law Ass'n Comm. on Int'l Commercial Arbitration, London Conference, 2000, Interim Report on Public Policy as a Bar to Enforcement of International Arbitral Awards: http://www.ila-hq.org/download.cfm/docid/E723662E-053C-415A-A4C7822 Accessed on 15.12.2024.AE6B4F."Transnational Public Policy" affirms that: "(…) an international consensus as to universal standards and accepted norms of conduct that must always apply (…) comprises fundamental rules of natural law, principles of universal justice, *jus cogens* in public international law, and the general principles of morality accepted by what are referred to as "civilized nations" (…)".

[207]Incesya Vallisoletana S.L. v. Republic of El Salvador, op. cit., para. 247.

burdens and to consider the contract null and void (…)".[208] These were general prohibitions of corruption that recognized international public order (Sayed, 2004) stating that the convergence in national laws[209] and in international conventions[210] lays the foundation for arbitral jurisprudence according to the opinions used in practice (Hwang, Lim, 2014; Llamazon, Sinclair, 2015; Cosar, 2015; Habazin, 2016-2018).[211] The principle of legality and the tribunals for the BIT, relevant to

[208]Incesya Vallisoletana S.L. v. Republic of El Salvador, op. cit., para. 247.

[209]United States the Foreign Corrupt Practices Act (FCPA). Foreign Corrupt Practices Act (FCPA), Pub. L. 95-213, 91 Stat. 1494 (1977). Omnibus Trade and Competitiveness Act of 1988, Pub. L. 100-148, Title V, para. 50003(c), 102 Stat. 1107, 1419 (1988) and from The International Anti-Bribery and Fair Competition Act of 1998, s. 2375.

[210]United Nation Convention against Corruption, op. cit., Council of Europe's Civil Law Convention, op. cit., The Inter-American Convention Against Corruption, op. cit., OECD Convention on Bribery of Foreign Public Officials in International Business Transaction, op. cit., Council of Europe Criminal Law Convention on Corruption, op. cit., United Nations Convention against Transnational Organized Crime, op. cit., Council of Europe Civil Law Convention, op. cit., Southern African Development Community Protocol Against Corruption, op. cit., United Nations Convention Against Corruption, op. cit., The African Union Convention on Preventing and Combating Corruption, op. cit.

[211]World Duty Free, op. cit.

consider the lawfulness of the investment and jurisdiction,[212] did not limit the investment treaty that followed the arbitration consensus, according to which the jurisdictional limitation did not concern the admissibility of the investment.

In the Plama case the tribunal, according to its jurisdiction, considered inadmissible the related claims that had to do with the investor and the related application of the law (Zimmermann, Tams, Oellers Frahm, Tomuschat, 2019).[213]

A tribunal does not deal with the admissibility of the case but with the related determination of its own jurisdiction (Moloo, Khachaturian, 2011).

[212]Incesya Vallisoletana S.L. v. Republic of El Salvador, op. cit., para. 257: "(...) Incesya's investment was made in a manner that was clearly illegal, it is not included within the scope expressed by Spain and the Republic of El Salvador in the BIT and, consequently, the disputes arising from it are not subject to the jurisdiction of the Center (…)".

[213]"(…) preliminary objections may be based on three different grounds: lack of jurisdiction, inadmissiblity of the application, or any other objection of a preliminary character. Neither the court, nor the parties have always made a clear distinction between the various grounds (…)".

Clean hands doctrine as an advantage in favor of states

Through the case law we have mentioned and investigated so far that the clean hands doctrine has laid the foundation for preventing arbitral tribunals from dealing with the relevant claims that had to do with investors. Thus, unlawful acts enable an investor to demonstrate the relevant defense for the host states and for the investors who are present in the arbitration, i.e. with the unclean hands.

For both parties in an investment arbitration that engage in illegal activities, the ICSID tribunal has not accepted the defense of the clean hands that has to do with the host state. The host state has relied on the unclean hands of the foreign investor and on the defense that protected the legitimate obligations towards the investor that constituted the fairness of an arbitration system. ICSID tribunals have overlooked the host state breaches of substantive rights that recognized for the treaty the relative involvement and acquiescence of the host state from the other party that resorted to unclean hands.

The arbitral jurisprudence thus simultaneously investigated the host state liability and for contractual breaches and actions that were contrary to the protection of the treaty object of the tribunal

that established the same treaty and put the investor's unclean hands that are demonstrated at a preliminary stage.

The only party that suffered the consequences from a bilateral corrupt conduct of the unclean hands involving public officials was the investor. It is evident that the host states ended up with advantage the illicit behaviors.

The investor was presented to the arbitration panel and the unclean hands excluded the involvement of the host state of the illicit conduct that did not consent and did not take into consideration the position of the state that did not contest. In such a case, it was in silence the conduct that violated the law. A pathological relationship that was called by the defendant in court being also exempt from any form of liability.

Host states, in this regard, participate in the illicit activities and tolerate them. Tribunals have, on their side, allowed that host states are exempt from any kind of international liability. In the area of fraud and corruption the relative tendency for arbitral tribunals to reject the investor's claims on corruption and to address the problems related to the public sector.

The collateral effects have taken into account the punishment and corrupt activity for the investor.

The preliminary phase of the dispute is consequently dismissed and the related claims for the investor as lack of jurisdiction have

a rigid remedy for inadmissibility. This is a decision that prevented state conduct and granted the host state to have benefit in the case of an unlawful expropriation and to an investment where the violation of standards of treatment are exempt for forms of compensation.

In this regard, in the Fraport case it was affirmed that: "(...) Claimant's conduct is a jurisdictional issue, and the legality of the respondent's conduct a merits issue, then the respondent host state is placed in a powerful position. In the Biblical phrase, the Tribunal must first examine the speck in the eye of the investor and defer, and maybe never address (…) host state (…) an approach that does not respect fundamental principles of procedure (...)[214] claims founded on illegality should be dismissed for the benefit of the public rather than for the advantage of the defendant (…)" (Born, 2011).

Arbitral tribunals have considered that the investor's unclean hands in a preliminary phase of a dispute have to do with the knowledge of the relevant facts for the balancing and the conduct of both parties.

[214]Incesya Vallisoletana S.L. v. Republic of El Salvador, op. cit., and the dissenting opinion of judge Cremades, para. 36-41.

Acquiescence, state responsibility and investor wrongdoing

For host states, no obligations are imposed on investors to prosecute. Thus, wrongdoers can raise the relevant jurisdictional defenses that are based on corruption and fraud as well as on violations of national law (Greenwald, 2015). Thus, tribunals have taken into account that the host state has taken action to punish activities that involve corruption when elements believe that the host state was aware of a punishable fact and did not take steps to address it.

For host states, that give more weight to the clean hands defense, it has been demonstrated that the necessary measures prevent the involvement of public officials to fraudulent activities. Thus, host states demonstrate that the anti-corruption and anti-fraud standards in their legal system are intended to deter offences that are part of crimes by taking actions that prosecute public officials, who are involved in corruption offences.

The silence of the host state for the commission of an unlawful act and for the investor which is the justifying cause for the use of the clean hands doctrine in the preliminary phase of the dispute has to do with the knowledge of the relevant facts. The host state through the conduct of its officials also involves the commission of unlawful acts which are attributed to an arbitration proceeding to the investor. In this way, it puts public

officials to act for the government authorities thus inducing the investor to have a lawful conduct, necessary for the development of the investment. The defendant state, then, includes the clean hands defense to investigate and simultaneously deny international protection for the investment (Thirlway, 1989; Sinclair, 2007; Liakopoulos, 2022).

In this way, the principle of estoppel is applied which according to the ICJ: "(…) operates to prevent a state from contesting before a court a situation contrary to a clear and unequivocal representation previously made to its counterparty, either expressly or impliedly, on which representation that counterparty was, in the circumstances, entitled to rely and in fact did rely, and as a result that other party has been prejudiced or the state making it has secured some benefit or advantage for itself (…)" (Kaijun, 2017)[215].

In the Kardassopoulos v. Georgia case the state argued that: "(…) the tribunal did not have jurisdiction *ratione materiae* under the provisions of the ECT and the relevant BIT as the joint venture and the concession agreement between the investor and the two state-owned enterprises were void under Georgian law[216] (…) the statements made by the state-owned enterprises had created a

[215]ICJ, Temple of Preah Vihear, op. cit., para. 143-144.

[216]Ioannis Kardassopoulos v. The Republic of Georgia, op. cit., para. 191.

legitimate expectation as to the validity of the joint venture and the concession thereunder (…) Article 2.1 of the joint venture agreement provided for the formation of the joint venture in accordance with the provisions of the legislation for joint ventures (…) assurances given to the investor as to the validity of the agreement, approved by the government through some of its highest officials, closely involved in the negotiation (…) the position of Georgia was inadmissible (…) the principle of attribution was applicable and was based on the fact that Article 7 of the ILC Article on International Responsibility of States for Wrongful Acts provided that even in cases where an entity empowered to exercise governmental authority acts *ultra vires*, the conduct in question is nevertheless attributable to the state (…)".[217]

The participation of the state in the commission of an unlawful conduct through the formalization of an agreement encouraged the investor to engage a *de facto* unlawful behavior that prevented the state from raising the illegalities of the defense as requested by the investor in the preliminary phase of the dispute. This is not a very "original" position since we also encounter it in the Fraport case where it was stated that: "(…) principles of fairness should require a tribunal to hold a government estopped

[217]Ioannis Kardassopoulos v. The Republic of Georgia, op. cit., para. 192.

from raising violations of its own law as a jurisdictional defense when it knowingly overlooked them and endorsed an investment which was not in compliance with its law (...)"[218].

A state could thus invoke and avoid the related liability, the illicit behaviors that are committed by the investor. This solution forced the defendant states to follow the parties that were corrupt and to raise a related defense for the unclean hands (Leigh Anenson, 2018). In this regard, it is recalled the Wena Hotels v. Egypt case where it is affirmed that: "(…) reluctant to immunize Egypt from liability in this arbitration" because the Egyptian government was aware of the consultancy agreement that would be used to hide the corrupt payments and nevertheless decided not to prosecute the consultant (…)" (Lim, 2011).[219]

A state through its officials may voluntarily invest in its own trust[220] since it knew that an unlawful act was committed exclusively for the investor and did not respond as expected to its legal system, thus excluding the possibility of asking for "support" from clean hands.

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[218]Fraport AG Frankfurt Airport Services Worldwide v. Philippines, op. cit., para. 346.

[219]Wena Hotels Ltd. v. Arab Republic of Egypt, ICSID Case No. ARB/98/4, para. 116.

[220]Ioannis Kardassopoulos v. The Republic of Georgia, op. cit., para. 185. Tokios Tokelés v. Ukraine, op. cit., para. 86.

The ICJ argued, in this regard, that silence and failure to protest for a period of time was important considering that silent recognition was a position taken by the parties (Bowett, 1957; Sinclair, 2007; Liakopoulos, 2020b).[221]

It was, also, emphasized that silence accepted a factual and/or legal issue and the state had knowledge of the related facts by abstaining from protesting (Shaw, 2012). Several investment tribunals have already recognized that a state consents to unlawful conduct.

In the Tokios Tokelés case, the tribunal stated that: "(…) each of the investments made by that company in Ukraine over the next eight years[222] (…) Ukraine sought to support the argument that those investments could not be protected because they were made in violation of local law (…) Ukraine's allegations were well founded, the fact that those investments had been duly registered and the relevant government entity had never invoked any defect of registration or substance, clearly indicated that Tokios Tokelés had made an investment in accordance with Ukrainian laws and regulations (…)"[223].

In the same way, in the Tecmed v. Mexico case it was affirmed

[221]ICJ, Gulf of Maine, (Canada v. United States of America), ICJ Reports, 1984, para 130.

[222]Tokios Tokelés v. Ukraine, op. cit., para. 86.

[223]Tokios Tokelés v. Ukraine, op. cit., para. 87.

that: "(...) the tribunal rejected the defendant's argument regarding certain alleged irregularities committed by the investor in the operation of a waste disposal facility (...) the environmental authorities were aware of those alleged violations but (...) had not acted to inform the investor that the irregularities could jeopardize the renewal of the permit to operate (...) the investor had never been sanctioned for those irregularities by the Mexican authorities (...) those violations of environmental regulations could not constitute an ex post justification for denying the renewal of a permit (…)".[224]

In the Desert Line v. Yemen case the tribunal did not have *ratione materiae* jurisdiction and the General Investment Authority of Yemen did not issue the investment certificate that was requested by the investor.[225]

In this regard, the tribunal affirmed: "(…) the lack of an investment certificate could not be a plea that Yemen could raise in order to deny the jurisdiction of the tribunal (…) the investment enjoyed general approval by the highest government officials and the Yemeni Deputy Prime Minister had even extended certain benefits to Desert Line's investments under the Yemeni Investment Law (…) that state had waived the

[224]Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States, ICSID Case No. ARB(AF)/00/2, award, 29 May 2003, para. 151.

[225]Desert Line Project LLC v. Republic of Yemen, op. cit., para. 92.

requirement of the certificate and could not rely on the lack of it in order to deny jurisdiction subsequently and only in the "pathological" phase of the relationship (…)".[226]
The relevant decisions allowed the state to ignore the violation of an investment in relation to domestic laws and the infringements that cannot later use as sufficient grounds the jurisdiction of the arbitral tribunal.
In sum, we can speak of circumstances where the host state includes the exception of the unclean hands of the investor thus excluding the jurisdiction of the tribunal.

Silence, estoppel and the related circumstances

We have no cases that have been asked to continue investigations for alleged crimes and violations for investors in the development of the investment that raised defenses for admissibility and jurisdictions.[227]In the World Duty Free case it was argued that

[226]Desert Line Project LLC v. Republic of Yemen, op. cit., para. 93.

[227]Fraport AG Frankfurt Airport Services Worldwide v. Philippines, op. cit., para. 346: "(…) principles of fairness should require a tribunal to hold a government stopped from raising violations of its own law as a jurisdictional defense when it knowingly overlooked them and endorsed an investment which was not in compliance with its law (…) covert agreement, which by its nature is unknown to the government officials who may have

such basis was the denial of a remedy for the investor where the defendant states have prosecuted the government officials who were accused for individuals and for corrupt payments.[228] The same position was followed in the Fraport case.[229]

The departure for the control that concerned the liability of the state that hosted unlawful acts for officials of the general international law recalls art. 7 of the ILC of 2001 that allowed states to consider as liable for *ultra vires* acts their officials in circumstances that as it was read: "(...) the conduct of an organ of a state or of a person or entity empowered to exercise elements of the governmental authority shall be considered an act of the state under international law if the organ, person or entity contravenes instructions (…)" (Liakopoulos, 2020a).[230]

According to Art. 7 for unauthorized and/or *ultra vires* acts of organs, state entities, that indicated the behavior of a state organ

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given approbation to the project cannot be any basis for estoppel (…)".

[228]World Duty Free, op. cit., para. 308; Metal-Tech Ltd. v. Republic of Uzbekistan, op. cit., para. 336.

[229]Fraport AG Frankfurt Airport Services Worldwide v. Philippines, op. cit., para. 377, 385-386.

[230]ILC Articles on Responsibility of States for Internationally Wrongful Acts with commentaries, 2001: http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf Accessed on 15.12.2024.

for an entity exercising the prerogatives of a government authority, act and attribute to the state the organ and the entity that acted as excess to the authorities and against the received instructions.

The state thus goes out of the idea that the provisions and instructions are organs and/or agents and the actions, omissions have not been controlled and assumed different forms. Consequently, the contradiction with the principle that is referred to in Art. 3 of the ILC of 2001 is explained in the following way: "(…) not the case, one would end by authorizing abuse, for in most cases there would be no practical way of proving that the agent had or had not acted on orders received (…) acts of officials in the national territory in their public capacity (*actes de function*) but exceeding their authority (…)".[231]

The application of Art. 7 does not authorize official bodies that concern the conduct performed by a body where the official capacity draws the line of demarcation for a non-private conduct. A certain distinction is noted in the expression and in the notion of: "(…) the body, person or entity acts in such a capacity (…)" which is part of the same article 7 of the ILC of 2001. In this way, it is indicated the relevant conduct that includes the actions,

[231]See in particular the opinion of the Spanish government given in 1898 at the request of Italy in respect of a dispute with Peru.

omissions of bodies that apparently perform their official functions.

Art. 7 ILC of the 2001 is also applied in the conduct of a body where the state and an authorized entity exercises elements of government authority according to the cases that are attributed by Art. 4, 5 and 6 of the same article. So we can say that arbitral tribunals consider not only the activities that are unlawful but also the complicity of the state for investors.

In this case, the knowledge of an unlawful activity is not prosecuted but only for the defendant in an arbitration dispute. So arbitral tribunals have accepted the clean hands defense as an exception in the preliminary phase of a dispute. It is about conducts that the parties control where the relevant tribunal has its own knowledge for the facts of the case.

The Yukos case

The clean hands doctrine finds its reference in a case that is mentioned in the history of arbitration. It is the Hulley Enterprises (Cyprus) Limited, Yukos Universal Limited (Isle of Man) and Veteran Petroleum Limited (Cyprus) v. Russian Federation case where the arbitral tribunal stated: “(...) exist a “general principle of law recognized by civilized nations” within the meaning of Article 38(1)(c) of the ICJ statute that would bar

an investor from making a claim before an arbitral tribunal under an investment treaty because it has so-called "unclean hands". General principles of law require a certain level of recognition and consensus (…) basis of the cases cited by the parties, the tribunal has formed the view that there is a significant amount of controversy as to the existence of an "unclean hands" principle in international law (...)"[232].

The clean hands doctrine as a general principle in the field of international law, from a procedural point of view checks and negates the intention of an arbitral tribunal which is part of one of its members, which we also see in the Nicaragua v. United States case of the ICJ, which held that clean hands are part of the general principles of law.

The PCA tribunal with members: Yves Fortier QC, Charles Poncet and Stephen Schwebel, ruled in July 2014 against Russia "(...) to pay damages of over US$50 billion to the former majority shareholders of Yukos (…) Russia had carried out a full assault on Yukos and its beneficial owners in order to bankrupt Yukos and appropriate its assets while, at the same time, removing Mr. Khodorkovsky from the political arena (…). The award was the most expensive ever, 20 times larger than any

[232]Hulley Enterprises (Cyprus) Limited, Yukos Universal Limited (Isle of Man) and Veteran Petroleum Limited (Cyprus) v. Russian Federation, op. cit., para. 1358-1359.

previous one, and equivalent to approximately 20% of Russia's annual budget (Knowles, Moyeed, Lamprou, 2016) (…) alternatively "(i) the Tribunal does not have jurisdiction over Claimants' claims; (ii) Claimants' claims are inadmissible; and/or (iii) Claimants should be deprived of the substantive protections of the ECT (…) the unclean hands di Yukos be treated by the tribunal as contributory fault and/or a failure to mitigate on the part of Claimants (…) any damages awarded to Claimants should be discounted on the basis of their unclean hands (…) presented its argument at the jurisdictional stage, in Procedural Order No. 3 of 31 October 2006 (…) appropriate to defer consideration of the Parties' contentions concerning unclean hands (and) Respondent's criminal enterprise contention (…) to the merits phase, if any (…) (Knowles, Moyeed, Lamprou, 2016)[233] illegal and bad faith conduct committed by or attributable to investors, perpetrated over a decade, from the privatization of Yukos in the mid-1990s until its liquidation in November 2007, which were denied by the other party (…)" (Knowles, Moyeed, Lamprou,

[233]Hulley Enterprises (Cyprus) Limited, Yukos Universal Limited (Isle of Man) and Veteran Petroleum Limited (Cyprus) v. Russian Federation, op. cit., para. 1275, 1277. "(…) the Interim Awards, now with the benefit of a full presentation of the facts by the parties on all aspects of the Yukos affair, the Tribunal addresses respondent's "unclean hands" argument in this final award (…)".

2016).[234]

Russia considered the clean hands defence as an argument where the defendant had relied on two points of reference. In the first point it was noted that: "(...) ECT protects only *bona fide* and lawful investments and Respondent's consent to arbitrate only extends to such investments (…)" as established by Article 31(1) of the Vienna Convention on the Law of Treaties, a treaty must be interpreted in good faith and in accordance with its object and purpose.

In the second the host state, the object and purpose of the ECT could not extend to embrace the promotion and protection of illicit investments. Rather, as established in the preamble of the same treaty "(...) fundamental aim of the (ECT) is to strengthen the rule of law on energy issues (…) some arbitral awards, including Phoenix Action and Plama supported the argument that, even in the absence of an express legality clause in the relevant investment treaty (according to the formula "in

[234]Hulley Enterprises (Cyprus) Limited, Yukos Universal Limited (Isle of Man) and Veteran Petroleum Limited (Cyprus) v. Russian Federation, op. cit., para. 1281, 1311: "(…) disagree as to whether any of the instances of alleged illegal or bad faith conduct enumerated above could serve as a complete bar to Claimants' claims under the ECT (whether as a matter of jurisdiction, admissibility or otherwise) by virtue of the application of some rule or principle of law (…)".

accordance with the law") (…) illicit investments could not receive international protection and, indeed, the related claim should have been declared inadmissible (…) the respondent based the argument on the ruling in the Plama case, where the tribunal had rejected the claims based on the ECT at the merits stage holding that: "(a) the investment violated Bulgarian law and applicable principles of international law; a)the claimant's conduct was not in good faith; and (c) to grant ECT protection would therefore have been contrary to the clean hands requirement (…)".[235]

Clean hands as a requirement element and a general principle of law was based on Article 38 (1) (c) of the Statute of the ICJ. It undoubtedly put the main thought on the Gabčíkovo-Nagymaros draft as well as on the dissenting opinion of the judge Sxhwebel in the Nicaragua v. United States case who was part of the arbitral tribunal.

The respondent distinguished between conducts that were taken into account for the investment and recalled the award in the Hamester and Fraport cases where they gave importance to conducts and investments treaty claims. Unlawful conducts prior to the establishment of the investment took into account the Anderson v. Costa Rica case.

[235]Consortium Limited v. Republic of Bulgaria, op. cit., para. 140.

The same tribunal in this case: "(…) rejected the claims advanced by Canadian citizens (…) for lack of jurisdiction *ratione materiae* (…) follows that the acquisition by each claimant of the asset resulting from that transaction was also not in accordance with the law of Costa Rica (…)".

If this were the case in the Yukos case the arguments used for the unclean hands: "(...) could have no impact on their claims in these arbitrations because: (a) the ECT does not contain any principle of unclean hands; (b) no principle of unclean hands has been recognized as a general principle of law; and (c) the instances of unclean hands alleged by respondent are collateral illegalities that do not fall within the parameters of any unclean hands doctrine (…) creating a level playing field of rules to be observed by all participating governments, thus minimizing the risks associated with energy-related investments and trade (…)"[236].

The limits for the assertion of the general principle of international law which includes the clean hands doctrine invokes the respondent, who has allowed investors to make use of the unclean hands doctrine thus constructing a general principle for inter-state disputes: "(…) in which two sovereign states have assumed an identical or reciprocal obligation (…) as

[236]Consortium Limited v. Republic of Bulgaria, op. cit., para. 140.

in the draft articles on international responsibility and in that on diplomatic protection, both drafted by the ILC, there was no mention of a principle of clean hands and that much of the internationalist doctrine rejected such an approach while, its supporters confined it anyway within strict and precise limits (…) interpreting treaty provisions expressly requiring compliance with host state laws as a condition of jurisdiction, investment tribunals have strictly construed such provisions (…) any principle of unclean hands is potentially applicable in the situation at hand. The respondent is estopped from raising matters in these arbitrations of which it has long been aware, but has never challenged (…) investors argued that acquiescence, silence or absence of protest in situations which would normally require an active objection results in the operation of estoppel where such positive conduct is lacking (…) the respondent must have been aware of many (if not all) of the alleged violations as early as October 2003, through the searches and seizures of documents at the Moscow premises of GML MS, or at least as early as 6 October 2006 when the respondent first raised the matter in these arbitrations (…) a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose (…) it does not contain any express reference

to the clean hands principle nor, unlike what is found when looking at other investment treaties, does it contain an express legality clause (…) the absence of any textual reference the tribunal was called upon to verify whether, given that the treaty must be interpreted in good faith and in accordance with its object and purpose, the ECT, as a whole, could be interpreted as making the protection afforded to investments conditional on their legality or to the good faith of the investor (...) in the case at issue a principle of clean hands could be relevant in the arbitration at issue under Article 26(6) of the ECT itself which refers to applicable rule (…) or principle (…) of international law (…) the clean hands doctrine existed in international law as a general principle of international law recognized by civilized nations as established by Article 38(1)(c) of the ICJ Statute (…) aplicable investment treaty does not contain an express requirement of compliance with host state laws (as is the case with the ECT), an investment that is made in breach of the laws of the host state may either: (a) not qualify as an investment, thus depriving the tribunal of jurisdiction; or (b) be refused the benefit of the substantive protections of the investment treaty (…) the decision in Plama where it was established that the substantive protection afforded by the ECT did not apply to investments made not in conformity with the law since to grant protection to

the investor in that case would have been contrary to the principle *nemo auditor propriam turpitudinem allegans* and to the basic notions of international public order, according to which a contract obtained through illicit activity (in that case false representation) should not be "enforced by a tribunal[237] (…) will not be protected if it has been created in violation of national or international principles of good faith (…) the host state's law (…) general principle (…) that exist(s) independently of specific language (…)" (Robertson, 2020)[238]. These are positions on the Yukos case that were in the majority in agreement on point.[239]

The right to the investor, thus, invoked the offer of the ECT which rejected the illegality of obtaining an investment where it was taken into consideration that: "(...) no compelling reason to

[237]Plama Consortium Limited v. Republic of Bulgaria, op. cit., para. 143.

[238]Phoenix Action Ltd, op. cit., para. 101: "(...) the Tribunal's view that this condition-the conformity of the establishment of the investment with the national laws-is implicit even when not expressly stated in the relevant BIT (…)".

[239]Phoenix Action Ltd, op. cit., para. 1352 "(…) obligations on states to treat investors in a fair and transparent fashion, investment treaties seek to encourage legal and *bona fide* investments. An investor who has obtained an investment in the host state only by acting in bad faith or in violation of the laws of the host state, has brought itself within the scope of application of the ECT through wrongful acts. Such an investor should not be allowed to benefit from the Treaty (…)".

deny altogether the right to invoke the ECT to any investor who has breached the law of the host state in the course of its investment. If the investor acts illegally, the host state can request it to correct its behavior and impose upon it sanctions available under domestic law[240] (...) the clean hands doctrine constituted or not the general principle of law (…) prevented the investor from exercising the rights complained of (…) general principles of law require a certain level of recognition and consensus. However, on the basis of the cases cited by the parties, the Tribunal has formed the view that there is a significant amount of controversy as to the existence of an "unclean hands" principle in international law (…) the clean hands doctrine, such as *exceptio non adimpleti contractus and ex iniuria ius non oritur* (…) of the clean hands (…) Nicaragua's claims against the United States should fail

[240]Phoenix Action Ltd, op. cit., para. 1355, 1356. "(…) tribunals (...) allow any certain conclusions to be drawn as to their intended meaning. For example, the statement in Fraport that illegal acts in the course of an investment might be a defense to claimed substantive violations appears to suggest that, in some cases, the state's actions will have been justified as an appropriate response to the investor's violations of national law. As is clear from the decision, the statement by the Fraport tribunal does not imply the unavailability of the substantive protections of the treaty, but rather concludes that the respondent state has not incurred any liability under the treaty (…)".

because Nicaragua has not come to Court with clean hands (…)".[241]

In this way, the defendant referred to the dissenting opinions of the judges. In the ICJ cases they invoked the principle of the unclean hands considered as a "name".[242] As can also be read *ex novo* in the Tukos case:"(...) appears to have been an extensive review of jurisprudence, respondent has been unable to cite a single majority decision where an international court or arbitral tribunal has applied the principle of unclean hands in an inter-State or investor-State dispute and concluded that, as a principle of international law, it operated as a bar to a claim (…) unclean

[241]Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America), 27 June 1986, I.C.J. Rep., 1986, para. 63.

[242]PCIJ, Legal Status of Eastern Greenland (Denmark v Norway), PCIJ Series A/B No. 53, 5 September 1933 (dissenting opinion of judge Read) and Diversion of Water from the River Meuse (Netherlands v Belgium), 1937, PCIJ (Ser. A/B), No. 70, 28 June 1937, para. 25. Interpretation of Peace Treaties Case, advisory opinion of 18 July 1950, dissenting opinion of judge Read, I.C.J. Rep. 1950, p. 231, 244, Exh. R-1074; Case Concerning United States Diplomatic and Consular Staff in Tehran, (United States v. Iran), ICJ Reports of 24 May 1980 and the Dissenting Opinion of judge Morozov, p. 51, Exh. R-1087; ICJ, Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), 14 February 2002, I.C.J. Rep. 2002 (Dissenting Opinion of judge Van den Wyngaert), p. 137, Exh. R-1072: "(…) Congo did not come to the court with clean hands (…)".

hands does not exist as a general principle of international law which would bar a claim by an investor, such as Claimants in this case (…) the alleged instances of 'unclean hands' cannot have any impact on the availability of ECT protection for Claimants (…)".[243]

Equally important is the conduct that has to do with the illegal and bad faith on the part of the investor in the area of preliminary objections where the tribunal held, in this regard, that: "(...) have an impact on the Tribunal's assessment of liability and damages (…) claimants may not recover from the Russian Federation the fruits of their own wrongdoing (…) contributory fault codified by Article 39 ILC of 2001 (…) award of damages may be reduced if the victim of the wrongful act of the respondent state also committed a fault which contributed to the prejudice it suffered and for which the trier of facts, in the exercise of its discretion, considers the claiming party should bear some responsibility (…) a result of the material and significant mis-conduct by Claimants and by Yukos (which they controlled), Claimants have contributed to the extent of 25 percent to the prejudice which they suffered as a result of Respondent's destruction of Yukos. The resulting apportionment of responsibility as between

[243]ICJ, Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium, op. cit.

Claimants and Respondent, namely 25 percent and 75 percent, is fair and reasonable in the circumstances of the present case (…)". The state raises that the clean hands defense has contested the relevant conduct to adopt actions, sanctions against the investor in the perspective where the host state had the possibility to complain despite the use of acquiescence. The tribunal stated, therefore, that: "(…) unclean hands does not exist as a general principle of international law which would bar a claim by an investor (…) this provision must be read as a whole and not with a caesura after the general principle of law (…)".

The clean hands doctrine cannot prevent the investor's right in action from appearing as a jurisdictional and/or inadmissibility exception, precluding the proceedings that seek to balance the relevant conduct in the merits phase. In this way, it guarantees fair trial as a principle of justice. In the Yukos case it is confirmed that: "(…) Respondent's unclean hands argument fails as a preliminary objection. It does not operate to deprive the Tribunal of its jurisdiction in this arbitration, render inadmissible any of the Claimants' claims or otherwise bar Claimants' from invoking the substantive protections of the ECT (…) is a significant amount of controversy as to the existence of an "unclean hands" principle in international law (…) out of context

(…)".[244] The Tribunal stated that the clean hands principle in an arbitration *de quo* could be different.

Concluding remarks

From the previous paragraphs and through a rich jurisprudence we have noted that in a preliminary stage clean hands as a form of illegality that is part of corruption, fraud and domestic violation for the host state has created for investors and for the defendant states the opportunity to avoid disputes in investment matters.

It is accepted that the host states have participated in an illicit conduct that allows for the acquiescence to develop some consequences that have to do with illegal acts and conducts especially in the moment that the acquiescence has allowed illegality in time. Thus, in parallel, an unlimited right is also noted that invokes the clean hands doctrine (Ross, 2009; Lim, 2011-2012) that contests the development that obliges the investor to be compliant with laws and regulations of the host state.

The host state is involved in the relevant violation where the

[244]Hulley Enterprises (Cyprus) Limited, Yukos Universal Limited (Isle of Man) and Veteran Petroleum Limited (Cyprus) v. Russian Federation, op. cit.

competent authorities are not against the violations of the investor who brings the matter before the arbitral tribunal.[245]

According to the principle of estoppel the state is involved through the actions of its officials. According to Art. 7 of the ILC of 2001 (Liakopoulos, 2020a) the unlawful act has set the conditions for the clean hands doctrine. Consequently, the tribunal has addressed the issue in the dispute phase through the balance of the conduct of both parties on the knowledge of the facts in question.

The arbitral tribunals have taken the relative distances in the jurisprudence where it has denied that the investors in the unclean hands sector have continued to unfairly guarantee the superiority of the host states thus ending up abusing the development of illicit investments and denouncing, avoiding a continuous investigation on the liability sector.

In an unjustified way the states have faced an arbitral nature procedure where the unlawful act involves the state and the illegal activities that include acquiescence. Such activities cannot take into account that arbitral tribunals have allowed host states to ask for the "support" of the unclean hands for the investor as a defense for the defendants. They have followed the investors and have taken the relevant measures to prevent and control the

[245]Tokios Tokéles v. Ukraine, op. cit., para. 86.

wrongdoing with knowledge of the wrongful activity that it carries out only in the merit phase. The investor is not the only party to commit corruption according to the international arbitration context.

The arbitral tribunals are part of and take into account the unclean hands of the investors as a preliminary and jurisdictional question of admissibility and as an exception that controls the relevant phases.[246] This is an approach that seeks to balance and respect the involvement of the state. It also respects the acquiescence principle thus allowing the investor the relative wrongfulness for its own investment in the phase of its performance where the logic of contributors fault takes the parties to the dispute to go above the liability for the acts committed.

[246]Fraport AG Frankfurt Airport Services Worldwide v. Philippines, op. cit., and the dissenting opinion of Cremades.

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